IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 12, 2002 Session

STATE OF TENNESSEE v. RICHARD ODOM, a/k/a OTIS SMITH

Direct Appeal from the Criminal Court for Shelby County
No. 91-07049 Chris Craft, Judge

No. W2000-02301-CCA-R3-DD - Filed October 15, 2002

The defendant, Richard Odom, was convicted in 1996 for first degree murder and sentenced to death. Our supreme court affirmed the conviction but remanded for a resentencing hearing, which resulted in a jury's again sentencing the defendant to death, after finding, as an aggravating circumstance, that the defendant previously had been convicted of one or more violent felonies. He appealed that sentence, alleging, *inter alia*, that the indictment failed to charge a capital offense; and that the trial court erred in denying his motion for a continuance; denying his motion to apply the version of Tenn. Code Ann. § 39-13-204 in effect at the time of his offense; allowing as exhibits photographs of the victims of the crimes; and denying his motion to allow the jury to impose a sentence of life without parole. Following our review, we affirm the imposition of death.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and NORMA MCGEE OGLE, J., joined.

Robert C. Brooks (at trial and on appeal) and Edward Chandler (at trial), Memphis, Tennessee, for the appellant, Richard Odom.

Paul G. Summers, Attorney General and Reporter; Mark E. Davidson, Assistant Attorney General; William L. Gibbons, District Attorney General; and Phillip Gerald Harris and Amy Weirich, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Because of the complicated nature of this matter, we first will set out its history. The defendant was convicted in 1996 for the May 10, 1991, first degree murder committed in the perpetration of aggravated rape of Mina Ethel Johnson. The jury, finding three aggravating circumstances: (1) the defendant had been previously convicted of one or more violent felonies, Tenn. Code Ann. § 39-13-204(i)(2); (2) the murder was especially heinous, atrocious, or cruel, Tenn. Code Ann. § 39-13-204(i)(5); and (3) the murder was committed during the defendant's escape from

lawful custody or from a place of lawful confinement, Tenn. Code Ann. § 39-13-204(i)(8), sentenced the defendant to death. On direct appeal, our supreme court affirmed the defendant's conviction for first degree murder but reversed the sentence of death and remanded for a new sentencing hearing. See State v. Odom, 928 S.W.2d 18 (Tenn. 1996). The court found that reversible error was committed in the sentencing phase in that (1) the proof did not support application of the (i)(5), heinous, atrocious, cruel, aggravating circumstance; (2) the evidence did not support the jury's finding that the defendant committed the murder during an escape from lawful custody, (i)(8); (3) the trial court failed to permit the defendant to present the mitigating testimony of Dr. John Hutson; and (4) the trial court failed to properly instruct the jury as to nonstatutory mitigating circumstances. See id. at 32-33. At the resentencing hearing, which commenced on September 28, 1999, the jury found the presence of one aggravating circumstance, the defendant had been previously convicted of one or more violent felonies, Tenn. Code Ann. § 39-13-204(i)(2). The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstance and imposed a sentence of death. The trial court approved the sentencing verdict. In his appeal, the defendant presents the following claims:

I. The indictment failed to charge a capital offense;

II. The court erred in denying the defendant's motion for a continuance in order to complete psychiatric and neuropsychological testing;

III. The court erred in denying the defendant's motion to sentence him according to Tennessee Code Annotated section 39-13-204, as it existed at the time of the offense rather than as it existed at the time of resentencing;

IV. The court erred in allowing photographs of the homicide victims;

V. The court erred in denying the defendant's motion to allow the jury to impose a sentence of life without parole;

VI. The death penalty violates treaties which have been ratified by the United States, and violates international law;

VII. The Tennessee death penalty sentencing statute is unconstitutional;

VIII. The criteria of section 39-13-206(c)(1) have not been satisfied in the present case; and

IX. The cumulative effect of all errors necessitates reversal.

Following our review of the record on appeal and applicable authorities, we conclude that the defendant's arguments are without merit and affirm the imposition of death.

FACTUAL BACKGROUND

Although not an issue in this appeal, the factual findings developed during the guilt phase and summarized by our supreme court in the original direct appeal are as follows:

> The record indicates that at approximately 1:15 p.m. on May 10, 1991, Ms. Mina Ethel Johnson left the residence of her sister, Ms. Mary Louise Long, to keep a 2:30 p.m. appointment with her podiatrist, Stanley Zellner, D.P.M. She agreed to purchase a few groceries while she was out. Johnson had not returned at 5 p.m.; this delay prompted Long to call Zellner. He told Long that Johnson had not kept her appointment. As a result of a subsequent call from Long, Zellner agreed to return to his office and look for Johnson's car in the parking garage. He located her car in the parking garage and observed her body inside. He went immediately to the Union Avenue police precinct and notified officers.
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> Investigating officers found Johnson's body on the rear floorboard of her car with her face down in the back seat. Her dress was up over her back, and an undergarment was around her ankles. One of several latent fingerprints lifted from the "left rear seat belt fastener" of Johnson's car matched a fingerprint belonging to the defendant, Richard Odom, alias Otis Smith.
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> The medical examiner testified that Johnson had suffered multiple stab wounds to the body, including penetrating wounds to the heart, lung, and liver. These wounds caused internal bleeding and, ultimately, death. The medical examiner noted "defensive" wounds on her hands. Further examination revealed a tear in the vaginal wall and the presence of semen inside the vagina. In the medical examiner's opinion, death was neither instantaneous nor immediate to the wounds but had occurred "rather quickly."
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> Three days after the incident, Sergeant Ronnie McWilliams of the Homicide Unit, Memphis Police Department, arrested the defendant. As a result of a search incident to arrest, McWilliams confiscated a large, open, lock-blade knife from the defendant. When they arrived at the homicide office, McWilliams told the defendant of the charges against him and read his Miranda rights to him. The

> defendant executed a "Waiver of Rights" form, signing "Otis Smith." A short time later he acknowledged having identified himself falsely, executed a second rights waiver by signing "Richard Odom" and gave McWilliams a complete, written statement.
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> In his statement, the defendant said that his initial intention was to accost Johnson and "snatch" her purse after having seen her in the parking garage beside her car. He ran to her and grabbed her; both of them fell into the front seat. He then pushed her over the console into the rear seat. He "cut" Johnson with his knife. Johnson addressed him as "son." This appellation apparently enraged the defendant; he responded that "[he] would give her a son." He penetrated her vaginally; he felt that Johnson was then still alive because she spoke to him. Beyond the first wound, the defendant claimed not to have remembered inflicting the other stab wounds. Thereafter, the defendant climbed into the front seat and rifled through Johnson's purse. He found nothing of value to him, except the car keys, which he later discarded. He then went to an abandoned building where he had clothing and changed clothes.

Odom, 928 S.W.2d at 21-22.

PROOF AT THE RESENTENCING HEARING

A. State's Proof

John Sullivan, whose mother was a close friend of the victim and her sister, Louise Long, testified as the first witness for the State. He described the victim as a "very shy, genteel person" who, even though in her late seventies, was completely capable of managing her own affairs. The victim had never married and had no children.

Sullivan said that Ms. Long called him on May 10, 1991, between 6:00 and 6:30 p.m., and told him that the victim was missing and that she was afraid something had happened to her. He immediately went to Ms. Long's apartment, and the two then drove to the victim's apartment to ascertain her whereabouts. When they did not find the victim at her apartment or see her car in the parking lot, Sullivan and Long drove to the Madison Avenue parking garage located near the victim's doctor's office. They drove up to the roof of the garage and then started driving back down. On their way down, Sullivan spotted a blue Chevrolet automobile which he believed to be the victim's car. He got out of his car and walked over to the blue Chevrolet where he found the victim in the backseat. Sullivan said that none of the car doors were open, the victim's "head was down towards the floor . . . her clothes were disheveled . . . [and] [i]t was obvious that she was dead." Not wanting to tell Ms. Long what he had discovered, Sullivan got back into his car and told her that he did not think that car was the victim's car. On his way out of the parking garage, he saw a police

officer at the entrance and informed the officer of what he had seen. Sullivan then drove Ms. Long home before returning to the garage to speak to the investigators. He later told Ms. Long what had happened to her sister.

Sergeant Donna Locastro of the Memphis Police Department testified that she responded to a missing person's call at approximately 6:25 p.m. on May 10, 1991, at Ms. Long's apartment. Ms. Long informed her that the victim had left Ms. Long's apartment at 1:30 p.m. to go to a 2:30 p.m. doctor's appointment and had not returned. Locastro and her partner decided to retrace the victim's route to her doctor's office and subsequently went to the parking garage at 969 Madison Avenue. Upon their arrival, Locastro saw Officer Hoffman and the victim's blue Chevrolet Nova which had all four doors closed. Locastro described what she saw as she approached the victim's car:

> [The victim] was in the back seat of the car on the floorboard with her head behind the driver's seat, turned back toward the left, so that you could see her face. And she had multiple stab wounds in her back, and she was bleeding from the anal area and from the vaginal area, and she had two bloody hand prints on her hips where someone had grabbed her from behind.

Sergeant Locastro and other officers then secured the crime scene.

Mary Louise Long, the victim's sister, testified that, on the day the victim was killed, the victim had an appointment to see Dr. Zellner about her broken foot. Ms. Long talked to the victim by telephone that day as she did every day. She described the victim as a "very quiet" person who was active in her church and had only retired from a secretarial job with an insurance company three years before her death. Ms. Long said that she missed her sister very much.

Dr. Jerry Thomas Francisco testified that he performed the autopsy on the victim's body on May 11, 1991, and determined that the cause of her death was "[s]tab wounds to the right ventricle, which means a stab wound to the heart." Dr. Francisco described the stab wounds he found on the victim:

> There was the stab to the chest, which was the one that penetrated to the heart, resulting in bleeding in and around the heart. There was a stab wound to the right lung. There was a stab wound to the liver, and there were two cuts to the right hand, which are described as defensive wounds, meaning that the hand was somehow involved as the stab wounds were occurring, so that there were cuts on the fingers.

In addition to the stab wounds, the victim had "a tear to the – what's called a posterior part of the vagina, which was a traumatic event causing this separation of tissue to the part of the vagina because of some trauma, either an attempt at penetration of a penis or other object into the vagina,

producing this tear." Sperm was present in the victim's vagina. Dr. Francisco determined that all of the victim's wounds were inflicted upon her while she was still alive. The stab wound to the victim's heart would not have caused instantaneous death, and all of the wounds would have caused immediate pain.

During cross-examination, Dr. Francisco was questioned about the human brain and agreed that serotonin is one of the neurotransmitters of the brain. He defined serotonin as "a chemical compound that's found in the body" but disagreed that it is the chemical compound that enables a person to control his or her behavior. On redirect, Dr. Francisco testified that, based on his years of experience in the scientific community and his expertise as a pathologist, he did not accept the scientific theory that serotonin is the only cause of aggression. On recross, Dr. Francisco conceded that he was not familiar with the studies concerning low levels of serotonin and that he had not read any scientific studies performed in the last twenty years concerning aggression and serotonin.

Sergeant Ronnie McWilliams of the Memphis Police Department Homicide Division testified that he arrested the defendant at approximately 7:00 p.m. on May 13, 1991, on Madison Avenue about two blocks from the crime scene. He said that fingerprints recovered from the victim's car had matched the defendant's prints. A search of the defendant's person produced "an Old Timer large pocket knife, locked blade, quite a large knife . . . underneath his shirt, between his pants and his back." After transporting the defendant to the homicide office and advising him of his rights, McWilliams and his partner, Sergeant R.D. Roleson, interviewed the defendant, taking both oral and written statements from him. The defendant first signed the advice of rights form as Otis Smith; however, after discovering that his true name was Richard Odom, McWilliams had the defendant sign a second form using his true name.

McWilliams recited the defendant's oral statement taken on May 13, 1991, at 7:45 p.m. In that statement, the defendant said he had been imprisoned in Mississippi for thirteen years for the May 1978 murder of "Becky." The defendant said he was "suppose[d] to be serving life for the murder" but had escaped and come to Memphis. He said he had been staying at the Admiral Benbow Inn on Union Avenue and that his prison identification was in his motel room.

When asked about the victim, the defendant told the officers that he had intended only to steal her purse in order to get some money to buy food. He said that he confronted the victim at the door of her car and pushed her into the backseat. The victim asked him, "What are you doing, son," to which the defendant replied, "I'll give you your damn son." The defendant said that while he was raping the victim, she told him that she had "never had sex with a man before." The defendant admitted that the knife the officers found on him "was the knife that [he] used on the lady." The defendant said, "I don't know how or where blood came from, but it was on me. I felt the blood. That was right after I felt the knife in my back and I pulled it out." The defendant did not remember how many times he had stabbed the victim.

Sergeant McWilliams also recited the defendant's written statement taken on May 13, 1991, at 10:29 p.m. In that statement, the defendant admitted killing the victim with an "Old Timer buck

knife, folding blade." The defendant again said that his only intention was to "snatch her purse and run," but when he grabbed her arm, they fell back into the car and he "managed to get [his] knife while doing so." The defendant said he did not know if he stabbed the victim when he got in the backseat with her or when he got back in the front seat. The defendant did not remember if he had vaginal or anal intercourse with the victim but was "quite sure she was alive because she told [him] she had never had sex before." He remembered going through the victim's wallet or purse and only finding Medicare cards, coupons, and a blank check. He exited the car, went down the stairs of the parking garage, threw the victim's car keys "into a hole," and walked to an abandoned motel on Lamar Avenue. There, he changed clothes and then went to a friend's house.

The defendant admitted to the officers that he had killed Becky Roberts in May 1978 in Pearl, Mississippi, and that he was "serving time for that until [he] escaped two months ago." He said he had come to Memphis immediately after escaping from the Simpson County Jail in Mendenhall, Mississippi.

Sergeant McWilliams testified that the defendant's Mississippi identifications were recovered from his room at the Admiral Benbow Inn, and his bloody clothes were recovered from the abandoned motel on Lamar Avenue. McWilliams spent about five hours interviewing the defendant and recalled that the defendant was calm and "[o]pen to conversation." The defendant did not seem remorseful; in fact, McWilliams "felt like he was kind of bragging a little bit about the situation."

During cross-examination, McWilliams testified that the defendant's fingerprint was recovered from the seatbelt inside the victim's car. He conceded that the defendant's oral statement was not a verbatim statement of what the defendant had said. Once the officers told the defendant about the fingerprint recovered from the victim's car, the defendant "told his side of the story" and admitted that he had committed a rape and a murder. The defendant told the officers that he knew he needed help "mentally–psychologically." McWilliams denied coercing or threatening the defendant into giving his statements.

Lillian Hammond testified that on May 8, 1991, she was working late at Shelby State Community College on Union Avenue in Memphis. She left her office at approximately 7:00 p.m. and walked to her car which was parked "right outside of the building." As she proceeded to unlock her car door, the defendant approached her, saying, "Don't make any noise or I'll kill you. Give me your purse." She asked the defendant what he wanted, and he said, "I want you." The defendant grabbed her left arm, and she fell to the ground by her car. The defendant repeatedly told her "don't make a sound or I'll hurt you." The defendant took her purse and suddenly backed away, again telling her, "You better not make a sound." Ms. Hammond said that the defendant did not sexually assault her during the encounter, but he was "sexually abusive in the language that he used . . . it was very vulgar."

Heather Cook of the Shelby County Criminal Court Clerk's office testified that, on January 21, 1992, the defendant was convicted of the robbery of Lillian Hammond.

Terri Roberts, the daughter of Becky Roberts, testified she was 17 years old in 1978 when her mother was murdered. Ms. Roberts admitted that she had been convicted of strong-armed robbery in 1981. In May 1978, her parents lived in a trailer at the Showtown Drive-In in Pearl, Mississippi, where her mother was the manager. Roberts said that, when talking on the telephone, her mother always sat in the "tanish-reddish brown" recliner which she kept against the wall underneath the telephone in the living room.

Ernest Simmons testified that on May 4, 1978, while employed by the Pearl, Mississippi, Police Department, he responded to a call at the Showtown Drive-In. As he entered the front door of the Roberts' trailer, he saw Becky Roberts "sitting in a recliner, facing the door . . . slumped over in a recliner, dead." The recliner had been moved approximately nine feet away from the wall where the telephone was located and had been placed two steps from the front door. Simmons described Mrs. Roberts' injuries:

> I observed what appeared to be two gunshot wounds to her eye, her forehead, some knife wounds to her neck and upper chest, and that's all I could see because clothing covered the rest. Some lacerations on her arms, lacerations on her hands. [] [S]he had some fixed bridge work; it had been broken out from the force of a blow. And that's what I observed when I saw the body the first time.

Simmons said a bloody hand towel and glass were found beside a sink in the bathroom of the trailer. Bloodstains and a "stainless steel Army mess-kit knife" with the blade "bent at almost a 90-degree angle" were found on the bed in the back bedroom. Blood smears were found on a wall on the back side of the trailer, and a bloody, serrated-edge steak knife was found in the hallway. Simmons said that the living room, "where the victim bled until she couldn't bleed any more," had the most blood of all the rooms in the trailer, and the telephone had been "ripped out of the wall." Two .22-caliber bullet casings were recovered, one from the floor in front of the victim's feet. Simmons explained that the murder weapon was a .22-caliber bolt-action rifle, which required reloading between shots. Inside the concession stand of the drive-in, officers discovered that the safe had been "rifled through" and found three drops of blood on the floor.

Simmons testified that John Roberts, Becky Roberts' husband, gave him the defendant's name for the interview list because the defendant had worked at the drive-in. When the officers went to the defendant's home to interview him on May 9, 1978, they "noticed enough evidence to ask for permission to search; and upon what [they] found there, an arrest was made." Simmons explained that a tennis shoe print had been found on a white bedsheet in the Roberts' bedroom, as well as two red buttons on the bed and floor. While talking to the defendant, who was a juvenile, and Jimmy Odom, his legal guardian, officers noticed a pair of tennis shoes on the porch. Inspection of the sole of the tennis shoe revealed a strong similarity to the shoe print found on the bedsheet. After Jimmy Odom consented to a search, officers observed a red, flowered-print shirt with missing buttons hanging on a clothesline.

Simmons testified that the defendant, after being advised of his Miranda rights, gave a tape-recorded statement, which was later reduced verbatim to writing, at approximately 6:00 p.m. on May 9, 1978. Simmons then recited the defendant's statement wherein the defendant admitted he had gone to the Showtown Drive-In to "see about a job" and because Mrs. Roberts owed him money. The defendant said he and Mrs. Roberts argued and Mrs. Roberts tried to hit him with a clay flower pot, but he took it away from her and hit her in the face with it. They continued fighting in the back bedroom, and the defendant stabbed her with a knife. The defendant forced Mrs. Roberts to open the safe inside the concession stand, and then the two returned to the trailer where the defendant held a gun on her. When Mrs. Roberts pleaded with the defendant not to kill her, he told her, "Shut up, I'm trying to think." The defendant said Mrs. Roberts grabbed the barrel of the gun and it discharged accidentally. He shot her a second time because he was scared and "wanted to make sure she was dead" because she knew him. He then took approximately $255 from the safe and two guns and fled "through the swamp" because it was the shortest route to his house. He threw the "metal" gun into the swamp and hid the other gun and some of the money in a car parked near his house. The defendant said he "bought some dope" with the money.

The defendant also told the officers that "Rodney Reed and some old gray-headed man" were involved in the murder. However, Simmons was able to verify that Reed was at a doctor's appointment at the time of the murder.

Simmons said he had been unaware of the defendant's background but later discovered that he had been institutionalized at the Columbia Training School. However, he said the defendant seemed "like a nice, normal person . . . very street-wise." He described the defendant's demeanor at the time of his statement as "very calm . . . kind of like a deliberate thinking of what he wanted to say, but he had an extraordinary calmness about him." Simmons said the defendant never expressed any remorse. During subsequent interviews, the defendant contradicted his original statement by implicating only himself in the murder. Simmons said the defendant was convicted of the murder of Becky Roberts in Rankin County, Mississippi.

Dr. George M. Sturgis testified that he performed the autopsy on Becky Roberts. He described the two gunshot wounds inflicted upon Mrs. Roberts:

> She had one gunshot wound to the left eye, destroyed the left eye, penetrated through the bony orbit of the eye on the left, crossed the midline, fracturing the sphenoid bone, lacerated the optic chiasma, which is where the two optic nerves cross at the base of the brain, and penetrated through the left cerebral hemisphere, exited . . . the right cerebral hemisphere and exited through the right side of the brain. So it entered the left, exited the right.
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> . . . .

> [The second gunshot] entered the right forehead, just below the hairline, penetrated the bony calvarium (phonetic) and the right frontal bone, entered the right frontal lobe of the brain, crossed the midline, lacerating the corpus callosum, and penetrated through the left cerebellar hemisphere posteriorly. The missile bounced off the inside of the occipital skull and lodged itself in the left cerebellar hemisphere.

Mrs. Roberts also had a critical stab wound to the chest which penetrated her left lung to a depth of approximately one centimeter. Dr. Sturgis determined that Mrs. Roberts was still alive when the gunshot wounds and stab wound were inflicted on her. In addition to these wounds, Mrs. Roberts also had a "laceration that began in the . . . left lateral neck and extended across the midline to the right," several minor stab wounds on the anterior chest, a laceration on the lower right lip, and bruises on her neck suggesting that she may have been strangled.

During cross-examination, Dr. Sturgis said he was unable to determine at what distance the gun was fired, but the gunshot wound to Mrs. Roberts' forehead was at short range. From the trajectory of the bullets that entered her brain, Dr. Sturgis was able to determine that the gun was fired from different angles. One small caliber bullet was lodged in Mrs. Roberts' brain.

Mary Jane Lemon, an assistant district attorney general in Rankin County, Mississippi, testified that she was the prosecutor in the defendant's July 1998 retrial for the murder of Becky Roberts. The jury again convicted the defendant of murder. During the course of the case, neither the trial court, defense counsel, nor the State requested that the defendant undergo mental evaluation. Lemon said the defendant never displayed any signs of mental illness or psychosis during his retrial.

B. Defendant's Proof

Glori Shettles Johnson, a private investigator whose work mostly involved capital cases for defense attorneys, testified that she obtained personal records and a social history of the defendant's childhood. Her research established that the defendant's biological parents, Richard Norman Smith and Nellie Ruth Holley Henry, married in 1958 when Mr. Smith was 18 years old and Ms. Henry was 15. The defendant was born in Mississippi on August 13, 1960, and was named Richard Lloyd Smith. He had an older sister, born in 1959, and a younger sister, born in 1962.

The defendant lived with his parents until they abandoned him at the age of two and a half. The defendant never saw his mother again and did not see his father again except for a brief encounter when he was 13. The defendant's father reported that he drank heavily as a young man and was often away from home. He said that the defendant's mother was young, did not want the children, and did not care for them properly. The defendant's parents often fought and left the children at a day care center in Jackson, Mississippi, "for days at a time." Shirley and Jimmy Odom lived near the day care center and adopted the defendant in 1963. Other members of the Odom family adopted the defendant's sisters.

The Odoms already had three children of their own, Cindy, Larry, and Jimmy, when they adopted the defendant. The defendant's adoptive father was not physically abusive but was "very stern" and "very loud." By the time the defendant was five years old, the Odoms had divorced and Mrs. Odom had remarried. She married Marvin Bruce, and they had three children of their own. Mr. Bruce was "mean" and "cruel to the children." Mr. Bruce sexually abused the defendant and Larry Odom and threatened to kill them and their mother if they told anyone about the abuse.

The defendant's adoptive grandmother never accepted the defendant and was "very, very physically abusive" to him. The grandmother once whipped the defendant "so much that her son had to literally pull her off because he was afraid of what she was doing." Many reports also surfaced of the defendant being burned with cigarettes on his feet, but Johnson was unable to verify this with medical documentation. Family members reported that the defendant was always hungry, and Marvin Bruce often gave the defendant his food after deliberately putting hot sauce on it and in the defendant's mouth.

The defendant also wet his bed from the time he came into the Odom home until his early teens. Mr. Bruce berated the defendant for this, saying, "Why are you doing this, why can't you grow up, why can't you be a man[?]" The defendant also had a problem with sleepwalking and once, while sleepwalking, urinated in Mr. Bruce's car and in the refrigerator on more than one occasion.

The defendant did not learn he was adopted until he was about 12 years old. He began running away from home and was charged with larceny in the juvenile system at age 13. He was institutionalized at the Columbia Training School at age 13 and was evaluated by a psychologist, Dr. Cox, who described the defendant as "[s]chizoid" and opined that he was "incorrigible . . . brain damaged . . . not fit for society at age thirteen." Two years later, as the defendant continued to have problems in the juvenile system, Dr. Cox evaluated him again, finding that he "caused a lot of his own problem[s] and that he would probably be destined for a life of institutionalization." At age 16, the defendant was placed on juvenile parole and released into the community.

During cross-examination, Johnson said that further research revealed that the defendant's adoptive brother, Larry Odom, had a criminal record and was incarcerated for approximately ten years. She believed that the defendant's other adoptive brother, Jimmy Odom, had a juvenile record but was unable to verify it. No reports of any of the Bruce children having a criminal history surfaced during Johnson's investigation.

While imprisoned in Mississippi for his conviction for the murder of Becky Roberts, the defendant had behaved well enough to be transferred from Parchman State Penitentiary to the South Mississippi Correctional Center in Green County and then to the Simpson County Jail, where he was a trustee. Since being incarcerated in the Tennessee Department of Correction, the defendant had received a correspondence paralegal degree from the Professional Career Development Institute, scoring 100% in criminal law and between 90 and 100% in each of the other legal areas. The defendant also had received good reports from the Department of Correction, indicating that he was

not having difficulties in prison and had been able to conform his behavior to the mandates of the prison.

Dr. Dennis Earl Schmidt, a neuropharmacologist and neurochemist at Vanderbilt University School of Medicine, testified that he, Dr. Steven Rossby, and Dr. Benjamin Johnson performed a spinal tap on the defendant in prison during the summer of 1999. Dr. Johnson actually performed the procedure, withdrawing six one-milliliter samples of fluid from the defendant's spinal canal. Dr. Schmidt carried the samples to his laboratory at Vanderbilt for analysis. Each sample of cerebrospinal fluid was analyzed in triplicate using a technique called "high-performance liquid chromatography," which utilizes a machine to separate and quantitate the amount of the different components of the fluid. The results of the analysis revealed that the defendant had very low levels of serotonin in his brain, less than half of normal levels. Dr. Schmidt provided the results of his analysis in writing to Dr. Rossby.

Dr. Steven Paul Rossby, a molecular neurobiologist and a professor at Vanderbilt University School of Medicine, testified that he statistically analyzed Dr. Schmidt's results and concluded that the defendant's serotonin function was "severely, extremely abnormal . . . the lowest level we've ever seen in our lab." Dr. Rossby explained that brain chemistry research performed on inmates in Finland and Sweden showed a very strong link between low serotonin and impulsive behavior, including unrestrained aggression, violence, and rage. However, the research did not indicate that low serotonin makes a person aggressive but did indicate low self-control. The impulses released by the low self-control depends on individual factors, such as heredity and early childhood experiences. Dr. Rossby opined that if a person has a low serotonin level, "any kind of excitatory stimulus or trigger or occurrence would not be as controlled as a normal person. The capacity to control these impulsive behaviors is diminished by low serotonin."

Dr. Rossby testified that the defendant's control of anger could "rapidly be lost," triggering rage which could "rapidly escalate into full-blown rage," as a result of his serotonin level. When questioned about the victim using the word "son" when the defendant attacked her, Dr. Rossby related:

> The use of the word "son," . . . in my expert opinion, could have served as trigger to release the rage that he felt toward his mother or mother figures or any women who were in his life in a mother capacity who didn't protect him or who rejected him. The word "son" could function as a trigger to cause an ensemble of neurons to fire, resulting in a rage reaction which is not effectively opposed by his serotonin levels and essentially is discontrolled.
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> But I'm not saying that's what happened. I'm saying that, based on what I've read and based on the scientific evidence, . . . that could explain – biologically could explain how it escalated to the point that it did. And I also feel that the humiliating position that he placed [the

> victim] in is also an expression of rage. And in reading his life history and learning that he was abandoned around two years old and then the succession of circumstances in his life, I think it's quite plausible that his control mechanisms did not develop normally.

On cross-examination, Dr. Rossby admitted that he was a doctor of philosophy, not a medical doctor, and that he was being paid $150 per hour for his time in court and $100 per hour for his time out of court. He conceded that no studies exist to support that low serotonin causes violent behavior, and could not say that the defendant's low serotonin caused him to murder Becky Roberts or rape and murder the victim.

In rebuttal, the State presented Dr. John Robert Hutson, a clinical psychologist, who also testified regarding serotonin:

> You can't say that serotonin causes anything. . . . There seems to be a relationship between serotonin – and we don't even know very much about, as I understand it, what levels and what emotional states, let alone, anything about what behaviors. But what that relationship is, whether it is a causal one, that's – I don't know anyone that knows that at this point.

Dr. Hutson said he was not aware of any literature indicating a causal effect between serotonin and violent behavior, obesity, depression, or suicide attempts. On cross-examination, Dr. Hutson admitted that this was the first time he had testified specifically on the subject of serotonin.

At the close of the proof, the jury was instructed on the following statutory aggravating circumstance:

> The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. The state is relying upon the crimes of Murder and Robbery, which are felonies involving the use of violence to the person.

See generally Tenn. Code Ann. § 39-13-204(i)(2) (Supp. 1990). The jury was also instructed that it should consider any mitigating circumstances supported by the proof. The trial court instructed, but did not limit, the jury as to all mitigating circumstances delineated in section 39-13-204(j)(1)-(9).

After deliberations, the jury found that the State had proven the aggravating circumstance (i)(2) beyond a reasonable doubt, and that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. In accordance with their verdict, the jury sentenced the defendant to death for the murder of Mina Ethel Johnson.

ANALYSIS

I. Failure of Indictment to Allege Capital Offense

The defendant asserts that, "pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the indictment against him did not charge a capital offense and that he cannot, therefore, be sentenced to more than life imprisonment." He grounds his argument on the premise that first degree murder is not a capital offense unless aggravating circumstances are alleged in the indictment, and the indictment upon which he was tried did not so allege. Thus, by his argument, the State then was precluded from filing a Rule 12.3(b), Tennessee Rules of Criminal Procedure, notice of intent to seek the death penalty because this rule provides that such notice may be filed only "[w]here a capital offense is charged in the indictment or presentment."

Tennessee Code Annotated section 39-13-202(b) provides that "[a] person convicted of first degree murder shall be punished by death or by imprisonment for life." Tenn. Code Ann. § 39-13-202(b) (Supp. 1990). Tennessee Rule of Criminal Procedure Rule 12.3(b) establishes the procedure for the State's seeking a sentence of death:

> (b) Notice in Capital Cases. – Where a capital offense is charged in the indictment or presentment and the district attorney intends to ask for the death penalty, written notice thereof shall be filed not less than thirty (30) days prior to trial. If the notice is filed later than this time, the trial judge shall grant the defendant upon his motion a reasonable continuance of the trial. The notice shall specify that the State intends to seek the death penalty and the notice shall specify those aggravating circumstances the State intends to rely upon at a sentence hearing. Specification may be complied with by a reference to the citation of the circumstance.

Tennessee Code Annotated section 39-13-204(a) provides for a separate sentencing hearing in a capital prosecution:

> Upon a trial for first degree murder, should the jury find the defendant guilty of first degree murder, it shall not fix punishment as part of the verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

Tenn. Code Ann. § 39-13-204(a) (Supp. 1990).

We will now review the holding in Apprendi, upon which the defendant relies for this assignment. Apprendi was convicted, on a plea of guilty, of using a firearm for an unlawful purpose, a second degree offense under New Jersey law that carried a sentence range of five to ten years in prison. There was evidence, although disputed by Apprendi, that his offense, shooting into the home of an African-American family, was racially motivated. New Jersey had a separate "hate crime" statute that increased the punishment for a second degree offense to a prison term of ten to twenty years if the judge found, by a preponderance of the evidence, that the defendant committed the underlying offense with a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. Apprendi was not charged under the hate crime law, and, though pleading guilty to the underlying offense, he objected to the sentence enhancement under that law. The judge rejected the challenge, applied the sentence enhancement, and sentenced Apprendi to twelve years.

On appeal, the Supreme Court concluded that the fact that the underlying offense was committed with a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation, or ethnicity, was a necessary element for increasing the punishment. Apprendi, 530 U.S. at 501, 120 S. Ct. at 2369, 147 L. Ed. 2d at 462. Specifically, the Supreme Court held:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999)]: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-53 (opinion of Stevens, J.); see also 526 U.S. at 253 (opinion of Scalia, J.).

Id. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455 (emphasis added) (footnote omitted).

Subsequent to the oral arguments in the instant appeal, our supreme court resolved the question of whether the Apprendi holding is applicable to Tennessee's capital sentencing procedure. In State v. Dellinger, 79 S.W.3d 458, 466-67 (Tenn. 2002), petition for cert. filed (U.S. Sept. 9, 2002) (No. 02-6354), the court explained why Apprendi is not applicable to a capital case:

> 1. The Apprendi holding applies to enhancement factors other than prior convictions.
>
> 2. The death penalty is within the statutory range of punishment prescribed by the legislature for first degree murder. Tenn. Code

> Ann. § 39-13-202(c)(1). The Apprendi holding applies only to enhancement factors used to impose a sentence above the statutory maximum. Apprendi, 530 U.S. at 481.
>
> 3. District attorneys in Tennessee are required to notify capital defendants no less than thirty days before trial of the intent to seek the death penalty and must specify the aggravating circumstances upon which the State intends to rely during sentencing. Tenn. R. Crim. P. 12.3(b). Rule 12.3(b) therefore satisfies the requirements of due process and notice.
>
> 4. Tennessee's capital sentencing procedure requires that a jury make findings regarding the statutory aggravating circumstances. Tenn. Code Ann. § 39-13-204(f)(1), (i). The Apprendi holding applies only to sentencing procedures under which judges sentence the defendants. Apprendi, 530 U.S. at 476.[1]
>
> 5. Tennessee's capital sentencing procedure requires that the jury find any statutory aggravating circumstance beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(f)(1), (i). The Tennessee statutes therefore comply with the "beyond a reasonable doubt" standard required by Apprendi. Apprendi, 530 U.S. at 476.

Applying the holding in Dellinger, we conclude that this assignment is without merit.

II. Denial of Continuance to Complete Psychiatric and Neuropsychological Testing

On appeal, the defendant argues that the trial court erred in denying his motions seeking a continuance of the September 27, 1999, setting for the resentencing hearing:

> The refusal of the court to grant a continuance in order to allow the defense adequate time for preparation for trial was an abuse of discretion and resulted in the denial of the defendant's constitutional

[1] Since the release of the opinion in Dellinger, the United States Supreme Court determined to be violative of the Sixth Amendment the Arizona capital sentencing procedure, wherein a defendant could not be sentenced to death unless the judge who presided at the trial had determined, in a separate hearing, "the presence or absence of the enumerated 'aggravating circumstances' and any 'mitigating circumstances,'" and may "sentence the defendant to death only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" Ring v. Arizona, __ U.S. __, 122 S. Ct. 2428, 2434-35, 153 L. Ed. 2d 556, 566 (2002) (quoting Ariz. Rev. Stat. Ann. § 13-703(F)). However, the court noted that twenty-nine states, including Tennessee, of the thirty-eight states with capital punishment, "commit sentencing decisions to juries." Id. at __, 122 S. Ct. at 2442 n.6, 153 L. Ed. 2d at 576 n.6. Accordingly, we conclude that the holding of our supreme court in Dellinger is not affected by the decision of the United States Supreme Court in Ring.

> right to due process and assistance of counsel. United States Constitution, Amendments VI, and XIV; Tennessee Constitution, Art. I, §§ 8, 9 and 17.

Additionally, the defendant argues in his reply brief that "the inability of the defense to be ready as anticipated was due, in part, to a delay by the State in approving additional funds to complete the Defendant's mitigation investigation and the psychological and psychiatric examinations."

In view of the nature and substance of this assignment, we will set out in full the trial court's October 12, 1999, "Order on *Ex Parte* Matters and Denial of Motion for Continuance" which details the complicated and lengthy chronology of this matter, as well as the court's reasons for the denial:

> This cause came on to be heard on the various *ex parte* motions filed by defendant, and the record as a whole,
>
> FROM ALL OF WHICH THE COURT FINDS that defendant's case was remanded back to this Court for resentencing after the State's petition to rehear was denied October, 1996, and was set for resentencing on January 27, 1997, by agreement of all parties. On December 20, 1996, this Court granted a continuance at the request of the state, the defendant's attorneys, and the defendant, acting *pro se*, and because a conflict of interest had arisen between defendant and the Office of the Public Defender. The circumstances of this conflict are set out in this Court's order entered June 4, 1997, continuing the resentencing hearing, relieving his former attorneys of representation and appointing his present attorneys, Robert Brooks and Ed Chandler. Not set out in that order, as the matter was heard *ex parte*, was the request of defendant's assistant public defenders that they needed a continuance because they had not had time to find an expert who would testify in mitigation concerning the defendant's mental condition. Filed in the original court jacket of this case is a report by the Mississippi State Hospital of the results of their evaluation of defendant in 1978 that "It was the unanimous opinion of the professional staff of the forensic unit that Mr. Odom was without psychosis, responsible and competent to stand trial[.]" . . . Dr. John Hutson had also been privately hired by the Public Defender's Office to examine the defendant for purposes of mitigation in his original trial, and although this Court has not been made privy to the report of his examination, he did testify in defendant's first sentencing hearing that he examined the defendant May 19th, 1991, May 31, 1991, December 30, 1991, April 10, 1992, and during defendant's original trial. Although the trial judge in that first trial

committed reversible error in not allowing Dr. Hutson to testify to defendant's social history, the defense never attempted to ask him about any mental problems he might have found in his examination of the defendant. He read from his findings from his examination on cross-examination, however, that

> In regards to his sanity at the time of his alleged offense Mr. Odom has never been diagnosed with any significant psychiatric disorder, such as would be likely to impair his ability to appreciate the wrongfulness of his actions, or to impair his ability to conform his behavior to the requirements of the law. He likely can be diagnosed as a personality disorder, but that is not particularly relevant to his defense. Furthermore, his description of his behavior just prior to and at the time of his alleged actions on or about 10 May, 1991, although indicative of some desperation with regard to finding food and shelter, does not indicate any significant impairment of his abilities.

. . . He had also indicated in his evaluation and report that there "appears to be a paucity of mitigating circumstances." On remand, defendant's resentencing attorneys therefore asked this Court in chambers to grant them funds to hire another expert, which this Court stated would be granted when the expert was chosen, and a proper motion and affidavit were filed. This expert had not been found by the December 20, 1996, motion hearing, and was an additional reason this Court granted the continuance of the January 27, 1997 resentencing hearing, as the defense needed additional time.

After new attorneys were appointed in the above-mentioned June 4, 1997 order, defendant filed on August 1, 1997, a "Motion to Set Resentencing," suggesting a resentencing date of December 1997 or January 1998, to give the attorneys several months to "conduct such further investigation as is necessary and to adequately prepare for the defendant's resentencing proceeding," which was granted. Due to the failure of the defendant to return from the State of Mississippi because of repeated resets of his murder retrial in that state, this Court was compelled to reset defendant's Tennessee retrial, and set a status report date of November 3, 1997, and then February 6, 1998.

In January and February of 1998, defendant filed *ex parte* motions for a mitigation specialist, a psychologist, a "jury selection and trial consultant," and a research assistant for a motion for change of venue. This Court granted the motion as to the mitigation specialist, Gloria Shettles, and entered a written order to that effect June 29, 1998. The motion for the jury consultant/research assistant was denied, as there was no showing of particularized need. *State v. Black*, 815 S.W.2d 166, 179-80 (Tenn. 1991). This Court also felt there would be no problem with pretrial publicity. In the pretrial jury questionnaire and individual voir dire on pretrial publicity administered at the resentencing hearing, only one juror, a television news reporter, was exposed to any prejudicial pretrial publicity, and she was excused for cause.

The motion for a psychologist stated that "Counsel has recently learned of possible indications in the defendant's behavior of an intermittent explosive disorder" due to a prison guard's telling counsel that the defendant had a violent temper. It was also supported by an affidavit from Dr. John Hutson, defendant's original psychologist, who referenced the 1978 Mississippi exam and his own exam of defendant in 1991, and stated he felt a new exam was warranted, as 7 years had passed since the original trial. He did not, however, note any finding at any time of any new mental problems possessed by the defendant. This Court told defendant's attorneys the motion would be granted once a psychologist was chosen and the proper motion and affidavits were filed. Between further status dates of February 27, 1998, March 26, 1998, May 29, 1998, and August 28, 1998, this Court received nothing from defendant requesting any funds for any mental health experts or examinations. Defendant was again convicted of the 1978 murder in Mississippi in July of 1998. This Court, on August 28, 1998, set an additional status report date for November 30, 1998, giving defendant an additional four months to complete any investigation necessitated by the Mississippi murder retrial and conviction, which the state was using as an aggravating circumstance. During this additional four month delay nothing was heard from defendant's attorneys *ex parte* regarding funds for a psychologist. On November 30, 1998 the resentencing hearing was then set for retrial May 10, 1999, by agreement of all parties, giving defendant more than 5 additional months to complete any needed mitigation investigation. Motions were heard February 26, 1999, and this Court allowed *ex parte* funds that same day for copies of pleadings from two other capital cases recently tried. No mention was made during these discussions of a need for a psychologist, and

this Court assumed that since 10 months had passed since the *ex parte* request for a psychologist, the defense was not going to proceed with a mental defense, given the lack of any support for one in the pleadings and record before this Court.

On March 2, 1999, a "Motion for Continuance of Jury Trial Set May 10, 1999," was filed by the defendant. An additional "Motion to Continue Motion Hearing and Jury Trial" was filed March 25, 1999, by the defendant. At the hearing on these two motions for continuance, defendant's attorneys revealed in open court that their mitigation expert, Gloria Shettles, for which this Court had allowed funds *ex parte*, had not completed the mitigation investigation, and that the attorneys had just recently discovered this fact, and could not be ready for trial May 10th. The State, understandably aggrieved, objected to the continuance and asked this Court to order the defendant to reveal the nature of the mitigation proof so that the State would not be handicapped in opposing the motions for continuance. This Court denied this request, granting over the State's strenuous objection the motions to continue, resetting the resentencing hearing for September 27, 1999, to give the defense more than five additional months to prepare.

After the continuance was granted, another *ex parte* motion for a psychiatrist was filed April 23, 1999, requesting Dr. Kenner, a Nashville expert, and a supplemental motion requested a spinal tap of the defendant and a serotonin study by Dr. Rossby, also from Nashville. These were both granted in orders entered by this Court on April 27, 1999, approved by Chief Justice Riley Anderson, and returned to this Court June 15, 1999. Also approved were additional funds for Gloria Shettles. Other motions were filed and heard May 28, 1999. This Court also approved in *ex parte* hearings a spinal tap of the defendant on July 15, 1999, an Order for Jail Records on August 6, 1999, funds for a transcript of the Mississippi trial on August 30, 1999, and funds for a glucose tolerance test on September 16, 1999.

On August 10, 1999, another motion for continuance was filed by the defendant, stating that a mitigation witness (later found to be Gloria Shettles) had a conflict with the September 27th date. In discussing a hearing date on the motion in court with Mr. Brooks, he informed me that only a one week continuance would be requested, and I asked him to get with Mr. Harris (one of the prosecutors) and agree on a date to hear the motion as soon as possible. This motion

was then withdrawn by defendant off the record, during a conversation between Mr. Brooks and Mr. Harris, in which Mr. Brooks told Mr. Harris to inform me that the motion would be withdrawn and would not need a hearing date, as the witness conflict had been resolved. This Court was so informed, and this motion is hereby shown withdrawn. No mention was ever made at any time during these discussions that the defense might not otherwise be ready for trial.

Mr. Brooks next came to see me in chambers on September 14, 1999, less than two weeks before trial date, with an *ex parte* written request for expert services to be performed beginning November 1, 1999, which stated that "Dr. Kenner has requested that a neuro-psychological evaluation of the defendant be performed by Dr. Pamela Auble . . . in order that he may complete his evaluation." This request was being made almost five months after the order was entered for funds for Dr. Kenner, and three months after receipt of those approved orders from the Supreme Court. I denied that request, stating that there could be no specialized need for services performed November 1st, as that would be after the resentencing hearing, which was to begin September 27th. Defendant then filed another Motion for Continuance on September 16, 1999, which was heard that same day, and denied. This Court finds that defendant's attorneys have been given more than enough time to prepare a mitigation defense. Although the delay of the resentencing from the first setting of January 27, 1997, was in part caused by the defendant's being in Mississippi, there is absolutely no excuse for the mitigation investigation not to have been completed during this period of time, prior to November 30, 1998. The defendant had different attorneys appointed to represent him in Mississippi, and that trial in no way prevented his present attorneys from their trial preparation of his Tennessee resentencing hearing. After defendant's conviction in Mississippi in July, 1998, he was returned to Tennessee, and had an additional 4 months to prepare for his status report date of November 30, 1998. After November 30th, he was granted an additional 5 months to prepare before his resentencing hearing, set May 10, 1999. Because this Court felt constitutionally compelled to grant yet another continuance of the May 10 resentencing hearing, as the attorneys admitted on the record their mitigation investigation was still not complete, this Court gave them an additional 5 months from the granting of the continuance until the new date of September 27, 1999. This period of time is much more than sufficient to have prepared any mitigation defense, no matter how involved, intricate or complex.

This Court also considered the nature of the expert services requested, a neuro-psychological exam, and felt that defendant could have those services performed prior to September 27th by someone else. The day after the September 16th motion for continuance was denied, this Court in fact entered an *ex parte* order at the request of the defense authorizing the neuro-psychological evaluation, to be performed immediately by a Dr. Alison Kirk in Nashville.

On September 22, 1999, the defendant filed yet another motion to continue, *ex parte*, which stated that after Dr. Kirk talked to Dr. Kenner, she changed her mind about performing the evaluation. This motion was supported by an affidavit from Dr. Kenner that stated that unless this evaluation were done (presumably by Dr. Auble) he could not in good conscience continue his work on defendant's case. This motion was argued in open court, as this Court cannot hear motions to continue *ex parte*, with the State being present, but not being allowed to see the motion. This Court denied that motion, for the reasons stated on the record at the time, stating also that the Court would enter this order additionally setting out *ex parte* reasons. There is still nothing on the record that would support any mental illness or defect possessed by the defendant which could be used in mitigation, and the nature of the additional services requested, for which the continuance was sought, are merely exploratory in nature. Although the defense desires that these services be performed, a showing of particularized need for funds for these services has not been shown, and they are not so material to mitigation that "the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995).

On September 23rd, 1999, another *ex parte* motion was filed, seeking this Court to authorize additional funds for Dr. Kenner to travel to Memphis to testify, supported by an affidavit from Dr. Kenner signed September 21st, which shows 2½ hours of examination of the defendant and 7½ hours review of records, and a bill for $2,000. He asked for an additional $10,000 limit to travel to Memphis and testify, although stating no conclusions that he found anything concerning the defendant's mental state the defendant could use in mitigation. This Court, in deference to the right of the defendant to put on mitigation, authorized the funds.

> On the day of trial, the defense informed this Court in open court that Dr. Kenner was refusing to come to Memphis to testify, because this Court would not allow a continuance so that Dr. Auble could perform additional tests. This Court, feeling that it should not allow the Criminal Justice System to be held hostage by a psychiatrist, offered to compel the attendance of Dr. Kenner, which offer was declined by the defense, presumably because Dr. Kenner would have had nothing to offer. The *ex parte* order previously entered on April 27, 1999, authorizing funds for Dr. Kenner is therefore rescinded, and it is hereby ordered that Dr. Kenner not be reimbursed by the Administrative Office of the Courts for any services performed by him in connection with this case, due to his willful refusal to testify in defendant's resentencing hearing.
>
> This Court has done everything in its power to allow the defendant to produce every bit of proof he could muster in his resentencing, allowing many continuances over a period of two years and eight months from the first resentencing hearing set January 27, 1997, and has allowed funds for numerous experts whenever requested. The defendant had a fair trial and presented an effective, although not victorious, defense. To have permitted yet another continuance to allow the defendant to conduct last minute exploratory examinations, for which no basis had been shown in the record, at the last minute whim of a petulant expert witness, would have been in this Court's opinion extremely improper, and would be a gross abuse of the judicial process.

We now will consider the defendant's claim that the trial court abused its discretion by denying the motion to continue the resentencing hearing from September 27, 1999.

The decision to grant or deny a request for a trial continuance rests within the sole discretion of the trial court. State v. Mann, 959 S.W.2d 503, 524 (Tenn. 1997) (citing State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991)). We will reverse the trial court's denial of a continuance only upon a showing that the denial was an abuse of discretion, and the defendant was prejudiced by the denial, in that there is a reasonable probability that, had the continuance been granted, the result of the proceeding would have been different. Id. (citing State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990)); State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994).

On appeal, this issue is presented with the defendant's claim that the trial court, by denying the motions for continuance, did not allow him time "to complete psychiatric and neuropsychological testing." The matter of such additional testing appears first to have been presented to the trial court

in the defendant's "Ex Parte Sealed Motion for Psychologist" filed in January 1998,[2] to which was attached a January 27, 1998, affidavit of clinical psychologist Dr. John Hutson, which suggested that further testing was appropriate because the defendant's last psychological evaluation was in 1991 and his last neurological examination, as best could be determined, was in 1978:

> I originally examined the defendant, Richard Odom[,] in mid 1991, in connection with this case;
>
> At the request of his present counsel I have reviewed my file on him and it is my professional opinion that a further psychological evaluation of Richard Odom would be prudent at this time because of the age of the prior evaluation, new information which has developed, and the limited scope of the prior evaluation. I believe a thorough new evaluation is necessary in order for Odom's psychological profile to be fully developed and considered for mitigation purposes. The last evaluation is nearly seven years old and further psychological and legal developments have taken place in the interim that should be considered by the sentencing jury;
>
> A further neurological exam is also indicated. The only previous exam which we could find was conducted in 1978 and not for the purpose of this case. Like the psychological evaluation, the neurological examination also was less comprehensive than would be indicated and expected for a case such as this. In my professional opinion, a current and in-depth neurological examination is necessary to fully explore any possible neurological factors that should be taken into consideration by the sentencing jury.

The defendant's motion to retain a psychologist concluded with the request that:

> the Court authorize the defendant to retain the services of clinical psychologist John Hutson to update and expand his previous psychological evaluation and the previous neurological evaluation of the defendant, and prays that this motion, any order entered thereon, and the record of any hearing be sealed.

According to the trial court's order of November 10, 1999, reciting the chronology of this matter, counsel who represented the defendant at the resentencing hearing had been appointed on November 30, 1998; and the hearing itself was set for May 10, 1999. However, on March 2, April 16, and May 10, 1999, defense counsel filed motions to continue the resentencing hearing, the latter of these motions stating that "[c]onsidering the time necessary to complete his preparations for said

[2]The stamped file date on the motion is legible as to the month and year, but not as to the day.

hearing and the schedules of the lawyers and witnesses involved[,] the time period most propitious for scheduling the hearing is the second half of August, 1999." Over the spirited objection of the State, the resentencing hearing subsequently was reset until September 27, 1999.

The defense had filed an *ex parte* motion on April 23, 1999, with a request identical as to that for Dr. Hutson, but this time requesting that psychiatrist William D. Kenner, M.D., be employed "to update and expand his previous psychological evaluation and the previous neurological evaluation of the defendant." That same day, defense counsel filed an additional *ex parte* motion to retain S. Paul Rossby, Ph.D., who, according to the motion, "strongly recommends that the defendant be evaluated for serotonin function to determine whether his capacity to control his impulsive/violent behavior is organically impaired."

In sealed orders entered on April 27, 1999, the trial court authorized that the defendant be examined and evaluated by Drs. Kenner and Rossby. In a related *ex parte* order entered on July 15, 1999, the trial court ordered that the State transport the defendant on July 25, 1999, to the Riverbend Maximum Security Institution infirmary for a spinal tap to obtain samples of his cerebrospinal fluid for serotonin level analysis.

Defense counsel then filed an *ex parte* motion on September 14, 1999, stating that Dr. Kenner was "currently in the process of evaluating the defendant in preparation for his sentencing hearing" and had "requested that a neuro-psychological evaluation of the defendant be performed by Dr. Pamela Auble . . . in order that he may complete his evaluation." The motion stated further that "Dr. Auble has agreed to perform said evaluation and is scheduled to do so on November 1, 1999, her first available date." Additionally, the motion advised that, at the request of Dr. Rossby, who also was "currently in the process of evaluating the defendant in preparation for his sentencing hearing," a glucose tolerance test would be performed on the defendant. By sealed order entered on September 16, 1999, the trial court authorized payment for this test and transportation of the defendant to the Nashville Memorial Hospital so that it would be done "on a mutually convenient time and date." Another sealed order was entered the next day authorizing a neuropsychological evaluation by Dr. Alison Kirk.

On September 16, 1999, the trial court had a hearing on the defendant's motion to continue the resentencing hearing. The State strenuously objected to a resetting, reciting arrangements made by certain of its witnesses to be present on the date scheduled for the hearing, including one returning from a sailing trip in the Atlantic Ocean and three witnesses coming from Mississippi. Additionally, the State advised the court that the State had expended $1200 for the May setting for jurors to come early and complete juror questionnaires, and had expended an additional sum for questionnaires for the September 27 setting. At the conclusion of the hearing, the trial court denied the continuance motion.

On September 22, 1999, defense counsel filed an *ex parte* affidavit in support of the motion for continuance of the resentencing hearing from its September 27, 1999, setting. The affidavit recited that "[s]ubsequent to the denial of the defendant's motion for a continuance to allow him to

obtain the services of Dr. Pamela Auble," counsel "attempted to locate someone who was able to perform the evaluation prior to the date set for sentencing, September 21, 1999 [sic]." The affidavit stated further that "[t]he only board certified neuro-psychologist counsel could locate who was available was Dr. Alison Y. Kirk. Dr. Kirk, however, has no forensic experience and is unwilling to testify in court." Thus, according to counsel's affidavit, Dr. Kirk concluded that "it would be professionally inappropriate for her to conduct the neuro-psychological evaluation in the case." Attached to the affidavit of counsel was a copy of a September 21, 1999, affidavit of Dr. Kenner, which stated in part:

> In Mr. Odem's [sic] case, I performed a psychiatric evaluation on September 17, 1999. As a result of that examination, I have recommended that Mr. Odem [sic] have a neuropsychological evaluation. Those neuropsychologist[s] in the mid-state area who have forensic experience were unable to schedule the examination in time to be finished for the trial that starts on Monday, September 27th. My understanding is that the neuropsychologists in the western part of the state are similarly busy.
>
> In my professional opinion, that neuropsychological examination is required in order to adequately prepare my testimony in this case. For me to go ahead and testify without that neuropsychological examination would mean that my work in Mr. Odem's [sic] case would fall below the standard of care in the community for a forensic examination in a capital case. I cannot in good conscience continue my work in Mr. Odem's [sic] case. Since I will be unable to complete my work in the case, I will not bill the State for the ten hours of my time invested to date.
>
> In my professional opinion, to adequately defend Mr. Odem [sic], his defense team will require both psychiatric and neuropsychological testimony.

The trial court held a hearing on the continuance motion on September 22, 1999, the same day that it was filed. The State again strongly opposed the continuance motion, advising the court of the efforts already made by its witnesses to be present at the resentencing hearing. The trial court denied the continuance motion.

Defense counsel then filed an *ex parte* motion on September 23, 1999, reciting that the trial court previously had authorized payment of $5000 to Dr. Kenner and stating that "Dr. Kenner has advised counsel for the defendant that he will require up to an additional $10,000.00 for his testimony at the defendant's sentencing hearing." Attached to that motion was an affidavit of Dr. Kenner, dated September 21, 1999, as had been his affidavit attached to the continuance motion filed September 22, 1999, and stating as follows:

> Being duly sworn, William D. Kenner, M.D. deposes as follows:
>
> In the above styled case, I have been asked to examine the defendant, Richard Odom. If, after a review of the records and neuropsychological evaluation, I find mitigating factors; then I will be asked to testify in his resenting [sic] hearing in Memphis. At this point, I have been approved for five thousand dollars through the trial court and the AOC. I have spend [sic] ten hours in the case (my bill to date is included) and I anticipate that considerably more time will be needed through trial. Before trial I anticipate re-reviewing the file and calling significant witnesses who were mentioned in the mitigation material. I may re-interview the defendant and talk with his family. In complex cases such as this, consultation with the defense attorneys often takes considerable time. Travel time between Nashville and Memphis adds to my time. Another factor that arises from the distance involves the economic use of time. In cases within driving time from Nashville, I can wait for a telephone call from the court to leave my office. In that way, my time spent waiting is minimal. In distant cases, I need a night's rest before I make the journey. As a result, I have at times been left waiting for hours to days before I could testify and return home.
>
> For the above reasons, I have asked that the trial court approve additional funds to finish this case. In order to be safe, I have asked for an additional ten thousand dollars. I am certain that my bill will not be that much but I would prefer to be safe rather than sorry.
>
> WILLIAM D. KENNER, M.D.

The trial court entered an order on that same day approving the additional expenditure requested by Dr. Kenner in his affidavit.

On September 27, 1999, the morning that jury selection was to begin for the resentencing hearing, the defense made an oral motion to continue the matter, stating as follows:

> As we indicated to you – I believe it was an ex parte communication, but I'm not sure. I know Mr. Brooks has notified the court that last week, much to our shock and surprise, one of our key witnesses, Dr. Kenner, a child psychiatrist in Nashville that we had employed, and had ex parte order awarding him monies, called me on Wednesday, I believe it was, about 8:00 o'clock in the morning –

> 8:30 – and said he was not coming. This was a bombshell to us because if you'll notice from my notice of intent to mental condition, he's one half of our defense.
>
> Now, let me try to explain that. For mitigation, we're going to call a Dr. Rossby, with regard to the spinal tap and the brain chemistry, which I think is sufficient to mitigate this case. But we had a double blow – kind of like a shotgun – we had two shots. The other half was Dr. Kenner. Now, let me explain to Your Honor what – there are some facts you need to be aware of. My client was born in 1960, and in 1963 he was adopted, and he was abandoned by his parents. He was subjected to child abuse, such as cigarette burns and sexual abuse. And we need Dr. Kenner, who is a child psychiatrist, to explain to the jury all these environmental factors which go to this issue. Now we're not capable of doing that.

Defense counsel, later in the hearing, detailed his conversation with Dr. Kenner:

> Next is I wrote Dr. Kenner on March 1, 1999, asking him to be a witness in this case, which he agreed to. Okay. Now that's March, April, May, June, and July and August, I'm thinking he's doing whatever has to be done. Okay. Now–and I'll be very frank with the court. When he called me on the phone and says I want this neuropsychological, it caught me by surprise. It may not have, but it did.
>
> Now, the rest of it I'll have to discuss ex parte. But, for the record, he calls me. We were not able to arrange that to his satisfaction, and so he says, look, "I'm not coming down there and testifying in [a] death penalty case; you get it continued," which we came in and told the court, and the court said no. I called him back and said, "Look, we can't get it continued. Come down and do the best you can." A few days later he calls up and says, "I'm not going to do that. I'm not going to come down and give observations and opinions that I have no basis for."
>
> Now, I sent him – this is very important. I sent him the entire social history, which is a stack of papers about [a foot] high. Okay.

In response to a question from the trial court, defense counsel said that Dr. Kenner had not been served with a subpoena for the trial and counsel did not "think that would be wise because it cost[s] money and he's not prepared to give an opinion." After further extended argument on this matter, the trial court denied the defendant's motion to continue the resentencing hearing.

Concluding his argument that the trial court committed reversible error in refusing to continue the resentencing from the September 27, 1999, setting, the defendant states in his brief:

> The denial of a continuance in order to complete psychiatric and neuro-psychological evaluations resulted in the defendant having no psychological proof, other than the exceedingly limited subject of his serotonin levels, available for his capital sentencing hearing and violated his rights to due process and assistance of counsel under the constitutions of the United States of America and the State of Tennessee.

Utilizing language from Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964), the defendant describes the trial court's denial of the continuance motion by saying that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." Again citing Ungar, as interpreted by this court in State v. Charles Edwin Lamb, No. 03C01-9701-CR-00010, 1998 Tenn. Crim. App. LEXIS 235, at *21 (Tenn. Crim. App. Feb. 20, 1998), perm. to appeal denied (Tenn. Nov. 2, 1998), the defendant poses the issue as "whether the trial court acted in such a manner as to prohibit trial counsel's preparation of a defense." However, we note that in Lamb the error occurred when the trial court required counsel to begin trial in a murder and conspiracy case on January 23, 1996, although counsel had been appointed only on January 8, 1996, the trial being scheduled before he was appointed. Id. at *22. Thus, the situation presented to the trial court in Lamb was vastly different than that in the instant case.

The defendant's analysis, arguing that the trial court erred in denying the continuance, glosses over several important facts. First, the record is silent as to why the psychiatrist retained by the defense, and approved by the trial court on April 27, 1999, and by the then chief justice of our supreme court on June 15, 1999, did not meet with the defendant to perform a psychiatric evaluation until September 17, or review the records sent to him until September 18, 1999. According to the record on appeal, it appears that Dr. Kenner waited three months after he had been approved, and until a little more than a week before the resentencing hearing was to begin, to first meet with the defendant, perform the evaluation, and determine that he needed, also, a neuropsychological evaluation of the defendant.[3] We note the payment for psychological and neurological examinations of the defendant had been approved in the same April 27, 1999, order of the trial court. The record does not explain how Dr. Kenner, given the lengthy list of tasks he intended to perform in order to complete his evaluation, anticipated doing so when he began working on the matter only ten days prior to when the hearing was to begin.

[3]The record is unclear as to when Dr. Kenner determined that a neuropsychological evaluation would be required. According to the defendant's *ex parte* motion filed on September 14, 1999, seeking a resetting of the resentencing hearing, Dr. Kenner had requested that this be done. However, in Dr. Kenner's affidavit dated September 21, 1999, he states that, as a result of his psychiatric evaluation of the defendant on September 17, 1999, he recognized the need for a neuropsychological evaluation.

We further note that the resentencing hearing had been reset, at the defendant's request, from its earlier setting, May 10, 1999, because his mitigation expert had not completed her investigation as of March 2, 1999, the day the continuance motion was filed. However, according to the affidavit of the mitigation expert dated April 12, 1999, and filed with the defendant's *ex parte* motion filed April 21, 1999, seeking additional funds for the expert, she estimated that the additional time required to complete all of her tasks, including the preparation for and testifying at the trial, was only 18.5 hours. The trial court approved her request for additional funds on April 27, 1999, and, according to the defendant's reply brief, the Chief Justice of the Tennessee Supreme Court did likewise on May 28, 1999. Therefore, assuming that the mitigation investigation was not completed until after the approval of the funds to do so, so little additional time was required to complete the report, it would not appear that this matter would have prevented Dr. Kenner from evaluating the defendant until ten days before the resentencing was to begin.

However, aside from the delay attributable to the expert witness, the defendant has an even more basic problem in establishing that the trial court abused its discretion in refusing to continue again the resentencing hearing. The record is silent, also, as to what conclusions Dr. Kenner would have reached had the matter again been reset for a neuropsychological evaluation of the defendant. In the trial court's *ex parte* order of October 12, 1999, the court found that "[t]here is still nothing on the record that would support any mental illness or defect possessed by the defendant which could be used in mitigation, and the nature of the additional services requested, for which the continuance [from September 27, 1999] was sought, are merely exploratory in nature." Attached to that order is a copy of an August 9, 1978, letter from Dr. Robert L. McKinley, Jr., of the Mississippi State Hospital to Judge Rufus H. Broome, advising as to the defendant: "The professional staff met today, August 9, 1978, after evaluating the [defendant]. It was the unanimous opinion of the professional staff of the forensic unit that Mr. Odom was without psychosis, responsible and competent to stand trial."

As we have stated, Dr. Kenner was brought into the matter only after a letter from Dr. John Hutson stating that there should be an updated psychiatric evaluation of the defendant. However, Dr. Hutson did not opine that such an evaluation necessarily would be beneficial to the defense. Our supreme court described the testimony of Dr. John Hutson in the first trial of this defendant:

> In mitigation, John Hutson, Ph.D., a practicing clinical psychologist since 1975, testified for the defendant. He stated that he had interviewed the defendant on five occasions. From these meetings, Hutson gleaned that the defendant's first twelve years had been chaotic. He opined that the defendant harbored much anger toward parental figures in general and toward mothers in particular. He found it significant that the victim had addressed the defendant as "son."
>
> Hutson related that the defendant had become progressively less hostile, defensive, sullen, and arrogant over the course of the

> evaluation process. Concerning the defendant's mental state, Hutson testified that the defendant "has never been diagnosed with any significant psychiatric disorder, such as would be likely to impair his ability to appreciate the wrongfulness of his actions, or to impair his ability to conform his behavior to the requirements of the law." Hutson opined further that the defendant "likely can be diagnosed as a personality disorder."

State v. Odom, 928 S.W.2d 18, 27 (Tenn. 1996).

Before we may conclude that the trial court abused its discretion in refusing to reset the resentencing hearing, we must find that there exists a reasonable probability that, had the continuance motion been granted, the results of the resentencing hearing would have been different. Since the record is silent as to whether Drs. Kenner and Auble, ultimately, would have provided findings or testimony helpful to the defendant, we would be engaging in rank speculation to conclude that the results of the resentencing hearing would have been different had it again been reset. Further, we note that Glori Shettles Johnson, the defendant's mitigation expert, testified extensively as to the defendant's abusive early years and that Dr. Rossby testified as to the defendant's difficulty in controlling himself, as a result of his low serotonin level, and that the victim's use of the word "son" might "have served as [a] trigger to release the rage that he felt toward his mother or mother figures or any women who were in his life in a mother capacity who didn't protect him or who rejected him."

We disagree with the defendant's claim in his reply brief that "the inability of the defense to be ready as anticipated was due, in part, to a delay by the State in approving additional funds to complete the Defendant's mitigation investigation and the psychological and psychiatric examinations." Given the three-month lapse between the defense psychiatric expert's receiving final approval to proceed and his evaluation of the defendant occurring, by his affidavit, only ten days before the resentencing hearing was to begin, it is difficult to understand how the evaluation was delayed by the State. Additionally, we disagree with the defendant's characterization of the trial court's denial of his continuance request, "[t]he court, drawing an analogy between a neurological evaluation of the defendant and his horoscope, and making reference to a 'Twinkie defense' and 'some kind of thing having to do with the Van Allen Belt,' denied the request for a continuance simply finding that the defense had enough time to prepare without reference to the particular circumstances of the case." By this reference, the trial court was responding to the defense's having advised, thirteen days prior to the resentencing hearing, that their psychiatric expert had just determined that a neuropsychological evaluation was needed and that it could not be performed until after the next setting, necessitating another continuance. The trial court made these now criticized references in observing that the defendant had not proved that these evaluations, for which the continuance motion was sought, ultimately would be of any benefit to the defense.

Contrary to the defendant's argument that his continuance request was denied because of the trial court's "myopic insistence" in proceeding with the resentencing hearing as scheduled, we find

fair and thoughtful the court's reasons for denying the continuance. While a defendant certainly is entitled to due process in his trial preparation, this mantle cannot automatically trump the trial court's authority to control the proceedings. If we were to conclude that, under these circumstances, a defendant's due process rights were violated by the court's adhering to the setting for the matter to commence, we would allow a due process claim automatically to override the trial court's authority to control the judicial process. The practical effect of our so holding in this matter would be that the setting date is merely a goal, which evaporates when a defense expert, without a showing of any conclusions, beneficial or otherwise, delays an evaluation to such a degree as to make impossible its timely completion.

We conclude that the trial court did not abuse its discretion in denying the motion for continuance and, consequently, that this assignment is without merit.

III. Sentencing Pursuant to Statute in Effect at Time of Offense

The defendant explained in his brief the basis for this assignment:

> The proof introduced by the State as to the facts and circumstances of the prior crime of violence of murder [was] graphic and gruesome. The only other aggravator introduced by the State was a robbery, the facts and circumstances of which were also improperly introduced, which was inconsequential in comparison to the murder case.
>
> The defendant had a statutory right to sentencing without the introduction of the facts underlying the aggravating offenses or of victim impact evidence. The denial of that statutory right constitutes prejudice to the judicial process and is reversible error under Tenn. R. App. P. 36(b).

This matter first arose prior to the resentencing hearing when the defense filed its "Motion to Apply T.C.A. § 39-13-204 As Of The Date Of The Offense," based upon the holdings of our supreme court in State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994), and State v. Smith, 893 S.W.2d 908 (Tenn. 1994). The State opposed the motion, citing State v. Pike, 978 S.W.2d 904 (Tenn. 1998), to argue that the changes in the statute subsequent to the offense modified only certain rules of evidentiary admissibility and thus were procedural, rather than substantive.

The defendant's brief does not identify the specific witnesses or testimony to which this assignment is directed, or any objections made by the defense and overruled by the trial court. Rather, in his reply brief, the defendant explains that his complaint in this regard is as to the trial court's pretrial ruling that, as to the resentencing hearing, the court would apply the version of Tennessee Code Annotated section 39-13-204 in existence at the time of the hearing, rather than the version at the time of the crime.

At the time of the 1991 offense, Tennessee Code Annotated section 39-13-204(c) provided substantial leeway to the trial court as to the admission of relevant evidence:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or of the state of Tennessee.

Tenn. Code Ann. § 39-13-204(c) (Supp. 1990).

At the time of the defendant's 1999 resentencing hearing, section 39-13-204(c) had been amended to include specific provisions as to a prior conviction of a felony involving violence as an aggravating factor:

> In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of such evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. Such evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons

> shall testify during the sentencing proceeding as to the impact of the offense.

Tenn. Code Ann. § 39-13-204(c) (Supp. 1999).

During the resentencing hearing in this matter, the State presented testimony from Lillian Hammond, who testified that the defendant robbed her on May 8, 1991; from Heather Cook, of the Shelby County Criminal Court Clerk's office, who testified that the defendant was convicted of this robbery on January 21, 1992; from Terri Roberts, who testified that her mother, Becky Roberts, was killed in 1978, in Pearl, Mississippi; from Ernest Simmons, of the Pearl, Mississippi, Police Department, who testified as to his investigation of the murder of Becky Roberts; Mary Jane Lemon, the Mississippi Assistant District Attorney General who prosecuted the defendant in the retrial of the Roberts homicide; and Dr. George Sturgis, who performed the autopsy and testified as to the injuries to Becky Roberts. The defendant has not cited in his brief, and we have not located during our review, any objections made by the defense on a relevance or related basis, and overruled by the trial court, as to any of the testimony of the fact and impact of his convictions for the robbery of Lillian Hammond and the murder of Becky Roberts. The State argues that, since specific objections were not made to this testimony, this issue has been waived. See Tenn. R. App. P. 36(a).

The defendant argues on appeal that the trial court erroneously applied the amended provisions of section 39-13-204(c) at the resentencing hearing, and that he was entitled to be sentenced under the law as it existed at the time of the offense, citing Tennessee Code Annotated section 39-11-112, which provides as follows:

> Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense.

Tenn. Code Ann. § 39-11-112 (Supp. 1990).

Our supreme court has determined that a resentencing hearing must be conducted in accordance with the law in effect at the time of the offense. State v. Cauthern, 967 S.W.2d 726, 732 (Tenn. 1998) (citing State v. Brimmer, 876 S.W.2d 75, 82 (Tenn. 1994)). However, laws which alter an evidentiary rule,

> but do not increase the punishment nor change the elements of the offense or the ultimate facts necessary to establish guilt, but only remove existing restrictions on the competency of certain classes of evidence or of persons as witnesses do not constitute ex post facto laws. State v. Bragan, 920 S.W.2d 227, 241 (Tenn. Crim. App. 1995)

> (citations omitted). In Dobbert v. Florida, 432 U.S. 282, 293, 97 S. Ct. 2290 (1977), the Supreme Court held that the prohibition of ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant." Instead, it is intended to secure "substantive personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Id. Thus, laws which change rules of procedure but which do not affect any substantial right of a defendant are not ex post facto laws.

State v. Pike, 978 S.W.2d 904, 926 (Tenn. 1998).

In determining the defendant's motion to apply Tennessee Code Annotated section 39-13-204, as of the date of the offense, the trial court entered findings of fact and conclusions of law, which we summarize as follows:

> 1. A defendant does not have "a vested right in evidentiary rules in place at the time of the offense, or to the proof the State could offer."
>
> 2. "Whether a statute applies retroactively depends on whether its character is 'substantive' or 'procedural.' If 'substantive,' it is not applied retroactively because to do so would 'disturb a vested right or contractual obligation.' On the other hand, '[r]emedial or procedural statutes apply retrospectively not only to causes of action arising before such acts become law, but also to all suits pending when the legislation takes effect, unless the legislature indicates that a contrary intention or immediate application would produce an unjust result.'" Kuykendall v. Wheeler, 890 S.W.2d 785, 787 (Tenn. 1994) (internal citations omitted).
>
> 3. "It is clear that the two 1998 amendments are procedural in nature, and may therefore be applied retroactively, for the same reason that the Tennessee Rules of Evidence are applied in criminal cases without regard to the date of the offense or the enactment of any amendment to the Rules."
>
> 4. The amendments in the present case (a) "only remove[] an existing restriction on the competency of a certain class of evidence, that of not allowing proof of circumstances surrounding prior violent crimes" and (b) "codif[y] existing case law on victim impact evidence, and allow[] persons as witnesses who otherwise might be excluded under" Tenn. R. Evid. 615.

> 5. "The Tennessee Supreme Court has consistently held that the capital sentencing law in effect at the time an offense was committed is applicable to any trial or retrial that may occur after amendments to the statute are made. See State v. Cazes, 875 S.W.2d 253 (Tenn. 1994); State v. Bigbee, 885 S.W.2d [797], 814 (Tenn. 1994); State v. Smith, 893 S.W.2d 908 (Tenn. 1994); State v. Hutchison, 898 S.W.2d 161 (Tenn. 1994); State v. Bush, 942 S.W.2d 489 (Tenn. 1997); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998)." However, these decisions all involved changes in substantive law.
>
> 6. The changes made by the amendments challenged by the defendant did not change substantive statutory law, but were enacted in reaction to judicial opinion. See, e.g., State v. Bigbee, 885 S.W.2d 797, 811 (Tenn. 1994) (facts of crime involving violence); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998) (victim impact evidence).
>
> 7. The rule in Brimmer is only meant to apply to substantive changes in the law, not procedural ones.

We find the trial court's conclusions well reasoned and logical. Indeed, this case is similar to Pike, 978 S.W.2d at 907, wherein the defendant objected to the trial court's allowing the State fifteen peremptory challenges in her capital murder trial, when at the time of the offense the Rules of Criminal Procedure and the statute allowed only eight challenges. Id. at 925. The court found the change procedural and, as such, the defendant could not show that a substantive right was impaired by the amended procedural rule. Id. at 926. Accordingly, the court held that applying the amended rule was not error.

Whether a statute applies retroactively depends on whether its character is "substantive" or "procedural." Kuykendall v. Wheeler, 890 S.W.2d 785, 787 (Tenn. 1994). "'[R]emedial or procedural statutes apply retrospectively not only to causes of action arising before such acts become law, but also to all suits pending when the legislation takes effect, unless the legislature indicates that a contrary intention or immediate application would produce an unjust result.' A statute is procedural if it defines '[t]he mode or proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right. . . .'" Id. (quoting Saylors v. Riggsbee, 544 S.W.2d 609, 610 (Tenn. 1976)). The amendments to section 39-13-204(c) are clearly procedural. Accordingly, the amendments were properly applied in the present case. This issue is without merit.

IV. Introduction of Photographs of Homicide Victims

The defendant explained in his brief this assignment of error:

> In the instant case, it was unnecessary to introduce the photographs of the victims of the two homicides (Exhibits 4, 5 and

> 15) in order to give the jury sufficient evidence relating to the circumstances of the crime so that it would have essential background information to ensure that it acted from a base of knowledge in sentencing the defendant. The testimonial evidence introduced would have been entirely sufficient to serve this purpose. On the other hand the danger of shocking and horrifying the jury by the introduction of these unnecessarily inflammatory photographs was great. The depictions of the victims in these photographs were particularly repulsive and likely to inflame the passions of the jury. The probative value of the photographs in the context of a resentencing was minimal. Indeed the trial court had a great deal of difficulty in verbalizing a compelling reason why these highly inflammatory photographs needed to be introduced at all.

The admissibility of the two photographs showing the dead body of Mina Ethel Johnson was discussed after the selection of the jury but before witnesses had been presented. The State sought to utilize in its proof two three-by-five-inch photographs, one apparently taken from the right rear door of the victim's automobile, with the second photograph apparently taken from the open left rear door of the victim's automobile. The first photograph depicts Ms. Johnson in the backseat of her car on the floorboard with her head behind the driver's seat, turned back toward the left, and shows multiple stab wounds to the back and bleeding from the anal and vaginal areas. The second photograph depicts Ms. Johnson in the backseat of her car, her head on the floorboard turned toward the back of the car, and holding a rolled-up check in her left hand.

As to the admissibility of these photographs, the State asserted that these two photographs had been entered into evidence in the defendant's first trial and were admissible in the resentencing hearing "to show the facts of the crime, to show the savagery of it." As the trial court reviewed the photographs, they were described as showing "a small amount of blood on [the victim's] rear end and blood on the seat to the left." The court said that "there is not any goriness about it at all."

The defense argued that since the rehearing was to fix punishment rather than to determine guilt or innocence, the probative value of the photographs was "greatly lessened." The State then showed the trial court other crime scene photographs which the State was not seeking to be admitted. We have reviewed these additional photographs and agree that the two which were admitted into evidence at the resentencing hearing were the least shocking of the group.

In admitting the photographs of Mina Ethel Johnson, the trial court found:

> [T]his picture shows that she wasn't raped on the hood of a car; that she was placed in the back seat of the car. She was disrobed from behind and positioned to be raped. And so – I mean, it's probative in the sense that the state has to rebut the mitigators that this was some kind of uncontrollable rage. We've had to address this in other cases

> where there's been a defense that the person just impulsively just went off and has no memory of what happened. Yet, for instance, in State v. Victor Cazes, yet, in that case – in the proof of that case, he had gone up to the porch and unscrewed the light bulb so that it was dark when he went in. Okay. That was used by the state to rebut the defense in the post-conviction that it was because he had this uncontrollable black-out rage.
>
> So the fact that the body was positioned in the back of the car – I mean, it's probative is what I'm saying. Given the defense, it's probative, and so for that – and I just don't see anything – this is prejudicial, no question. I don't see anything unfairly prejudicial. . . . I just don't see anything wrong with this picture. . . . What I'm saying is there is not anything – it's prejudicial but it's not unfairly prejudicial as I see it.
>
> . . . .
>
> . . . [T]hey showed, although that he got mad, from his confession and everything else, the proof at that time was that he did throw her over the seat into the back seat of the car. It would have been kind of hard – I mean, there was some thought to it. . . .
>
> . . . .
>
> I'm just saying that the position of the body is probative to some extent.

Additionally, the defendant argues that the trial court should not have allowed into evidence a photograph showing Becky Roberts, as her body was leaning across the right arm of a chair and with substantial blood on her face, neck, and right arm. Addressing the admissibility of the photograph of Mrs. Roberts, the court stated:

> Okay. I'm going to allow these [multiple photographs of the Roberts crime scene]. Let me say this. From these pictures, looking at the safe and everything, it also shows that this robbery – that this killing was done in the perpetration of a robbery, which shows some motive other than rage.
>
> Although your mitigating circumstances – you've already told the jury basically that he was born this way, he can't help it, that he does these things out of rage. These pictures, especially of the safe and things, they go to show that these crimes happen other than for

> rage. These pictures go directly to the mitigator, even if they had not changed the law on allowing proof of aggravating circumstances.

Referring then to the photograph of Becky Roberts' body in a chair, the trial court stated:

> The only one I find any unfair prejudice is this body sitting in the chair, and it's got blood, and it's somewhat gruesome, but the blood – the streaks of blood are probative and – and I don't think that – since there's no dismemberment, I don't think that the prejudice substantially outweighs the blood. And I just don't think the jury is going to be swayed or go crazy because they see blood.
>
> Sometimes when you talk about how somebody is killed and their eye being shot out or something, I've thought of some kind of horrifying thing with parts of eyes and brain matter, and it's not on this picture. So what I'm saying I think maybe the jury will probably have an even more horrible idea of this other than the picture, so for that reason, I don't see a problem with it.

The admissibility of photographs generally lies within the sound discretion of the trial court, and will not be overturned on appeal absent a showing that the trial court abused its discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). "Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases." State v. Morris, 24 S.W.3d 788, 810 (Tenn. 2000), cert. denied, 531 U.S. 1082, 121 S. Ct. 786, 148 L. Ed. 2d 682 (2001). In determining whether a photograph is admissible, the trial court must first determine whether it is relevant to a matter at issue in the case. See Tenn. R. Evid. 401; State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999); Banks, 564 S.W.2d at 949. The court must next consider whether the probative value of the photograph is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403.

Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. Additionally, the admissibility of evidence at a capital sentencing hearing is controlled by Tennessee Code Annotated section 39-13-204(c), which allows the admission of any evidence "the court deems relevant to the punishment . . . regardless of its admissibility under the rules of evidence." See State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). In essence, section 39-13-204(c) permits introduction of any evidence relevant to sentencing in a capital case, subject only "to a defendant's opportunity to rebut any hearsay statements and to constitutional limitations." Id. (footnote omitted).

Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and

prejudice the defendant. Banks, 564 S.W.2d at 950-51. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it may have upon the trier of fact. Vann, 976 S.W.2d at 103; State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993); see also Tenn. R. Evid. 403. Excluded is evidence which is "unfairly prejudicial," in other words, that evidence which has "'[a]n undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Vann, 976 S.W.2d at 103 (quoting State v. Dubose, 953 S.W.2d 649, 654 (Tenn. 1997)).

The defendant had previously been convicted of first degree murder and sentenced to death. Because this was the resentencing phase, the previous jury having determined the defendant's guilt, this jury was without benefit of the proof introduced during the guilt phase hearing as to the circumstances of the offense. In such cases, our supreme court has advised that, although the proof need not be as detailed as that offered at the guilt-innocence phase of the trial, some proof is essential to ensure both individualized sentencing by the jury and effective comparative proportionality review by the appellate courts. See State v. Nichols, 877 S.W.2d 722, 731 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S. Ct. 909, 130 L. Ed. 2d 791 (1995) (rejecting a defendant's claim that proof regarding the circumstances of the offense is not admissible at resentencing hearing and holding that such proof is necessary to provide individualized sentencing); see also State v. Smith, 993 S.W.2d 6, 44 (Tenn.), cert. denied, 528 U.S. 1023, 120 S. Ct. 536, 145 L. Ed. 2d 415 (1999); State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996). As a general rule, the introduction of photographs helps the trier of fact see for itself what is depicted in the photographs. State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App. 1997). The photographs of Mina Ethel Johnson show the position of her body where the homicide occurred and relate the circumstances of the offense. Additionally, because the defense relied upon the theory that the defendant acted on impulse or rage, the photographs were relevant to show that the defendant purposefully forced the victim into the back of the car and positioned her where he could disrobe and rape her from behind. Similarly, the photograph of Becky Roberts is admissible. The defendant presented evidence that he suffered from low serotonin levels and could not control his actions, and the photograph of Becky Roberts depicted the methodical manner in which the defendant perpetrated the murder. Their admission was appropriate under the criteria set out by the court in Banks, 564 S.W.2d at 951.

The photographs are relevant and are not so unfairly prejudicial as to bar their admission. Accordingly, we cannot conclude that the trial court abused its discretion by admitting these photographs. See Tenn. R. Evid. 403. This issue is without merit.

V. Denial of Defendant's Motion to Allow Jury to Return Sentence of Life Without Parole

In 1993, the General Assembly amended the capital sentencing statutes to provide for the sentence of life imprisonment without the possibility of parole. State v. Keen, 31 S.W.3d 196, 213 (Tenn. 2000) (citing 1993 Tenn. Pub. Acts ch. 473), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001). Prior to 1993, the only punishments available for a person convicted of first degree murder were life imprisonment and death. See id.; State v. Cauthern, 967 S.W.2d 726, 735

(Tenn.), cert. denied, 525 U.S. 967, 119 S. Ct. 414, 142 L. Ed. 2d 336 (1998). In Keen, our supreme court held that neither the state nor federal constitution required that a jury be allowed to consider life without parole for offenses committed prior to July 1, 1993. 31 S.W.3d at 217 n.7.

The defendant's offense was committed in 1991, over two years before the passage of the 1993 Act, and his resentencing hearing was conducted six years after the Act's effective date. He asserts that he was constitutionally entitled to have the jury provided the option of imposing a sentence of life without the possibility of parole, and that the legislature's action in limiting the application of the 1993 Act to crimes committed on or after July 1, 1993, violates both federal and state constitutions. However, the defendant acknowledges that these arguments have been rejected by our supreme court in Keen, 31 S.W.3d at 213-19. Since this court is bound by the precedent established by our supreme court, we find it unnecessary to review the propriety of its holdings. This claim is without merit.

VI. Death Penalty Violates United States Treaties and International Law

The defendant asserts on appeal that Tennessee's imposition of the death penalty violates the following treaties of the United States: the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By his argument, the disregard of these treaties violated the Supremacy Clause of the United States Constitution. These claims are based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment; and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty once it has been abolished. In his reply brief, the defendant presents the additional claim that the State's response, that the United States became a party to these treaties "with reservations" that capital punishment still could be imposed, is without merit because the United States Constitution does not permit such reservations.

Initially, we note that the defendant has cited no decision of any court accepting his arguments that, because of treaty obligations of the United States, the death penalty cannot be imposed in this country. In fact, the Sixth Circuit Court of Appeals, in Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001), dismissed similar claims that the Ohio death penalty scheme violated both international laws and treaties. In Buell, as in the present case, the defendant argued that Ohio's death penalty statute violated the Supremacy Clause by not complying with (1) the American Declaration of the Rights and Duties of Men and (2) the International Covenant on Civil and Political Rights and that "the prohibition of executions is not only a customary norm of international law, but rather, a peremptory norm of international law, or *jus cogens*, that is accepted and recognized by the international community and that cannot be derogated." Id. at 370 (citations omitted).

The court rejected the defendant's contention that "the abolition of the death penalty has been accepted by international agreement and as a form of customary law," id. at 371, finding (1) to the

extent that the agreements relied upon by the defendant ban cruel and unusual punishment, the United States had included express reservations preserving the right to impose the death penalty within the limits of the United States Constitution, and (2) the agreements were not binding on courts of the United States. Id. at 372. In so holding, the court reasoned:

> These agreements [the American Declaration of the Rights and Duties of Men and the International Covenant on Civil and Political Rights] do not prohibit the death penalty . . . . Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.
>
> Neither the OAS Charter [Charter of the Organization of American States] nor the American Declaration specifically prohibit capital punishment. See State v. Phillips, 656 N.E.2d 643, 671 (Ohio 1995). Furthermore, the United States Senate approved the OAS Charter with the reservation that "'none of its provisions shall be considered as . . . limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.'" Charter of the Organization of American States, 1951, 2 U.S.T. 2394, 2484.
>
> The International Covenant . . . does not require its member countries to abolish the death penalty. Article 7 of the International Covenant prohibits cruel, inhumane, or degrading punishment. . . . The United States agreed to abide by this prohibition only to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishments. See 138 Cong. Rec. S-4781-01, S4783 (1992) ("That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."); see also Jamison v. Collins, 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000) (citing Christy A. Short, Comment, *The Abolition of the Death Penalty*, 6 Ind. J. Global Legal Stud. 721, 725-26, 730 (1999)).
>
> Moreover, the International Covenant specifically recognizes the existence of the death penalty. . . .
>
> Finally, we note that even if the agreements were to ban the imposition of the death penalty, neither is binding on federal courts. "Courts in the United States are bound to give effect to international

> law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority." Restatement (Third) of Foreign Relations Law § 111 (1987). Neither the American Declaration nor the International Covenant is self-executing, nor has Congress enacted implementing legislation for either agreement. See Garza v. Lappin, 253 F.3d 918, 923 (7th Cir. 2001) (stating that the "American Declaration . . . is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations"); Beazley v. Johnson, 242 F.3d 248, 267-68 (5th Cir. 2001) (citing cases and other sources indicating that the International Covenant is not self-executing); Hawkins, 33 F. Supp. 2d at 1257 (noting that Congress has not enacted implementing legislation for the International Covenant).

Buell, 274 F.3d at 371-72.

As in the present case, the defendant in Buell also asserted that Ohio's death penalty violated customary international law. The Sixth Circuit rejected this argument as well:

> The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. This is confirmed by the fact that large numbers of countries in the world retain the death penalty. Indeed, it is impossible to conclude that the international community as a whole recognizes the prohibition of the death penalty, when as of 2001, 147 states were parties to the International Covenant, which specifically recognizes the existence of the death penalty.

Id. at 373 (citations omitted).

The court additionally advised:

> We believe that in the context of this case, where customary international law is being used as a defense against an otherwise constitutional action, the reaction to any violation of customary international law is a domestic question that must be answered by the executive and legislative branches. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government,

> as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out.

Id. at 375-76 (footnote omitted).

The authorities appear to be universal that no customary or international law or international treaty prohibits a state from imposing the death penalty as a punishment for certain crimes. See Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989); United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) (International Covenant on Civil and Political Rights not binding on the federal courts because it is not self-executing and Congress has not passed legislation implementing it); Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001); United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997); Faulder v. Johnson, 99 F. Supp. 2d 774, 777 (S.D. Tex. 1999) (In signing Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and International Covenant on Civil and Political Rights, United States made reservation stating that it understood language to mean cruel and unusual punishment as defined by the Eighth Amendment, which does not prohibit the death penalty.); Workman v. Sundquist, 135 F. Supp. 2d 871 (M.D. Tenn. 2001); Jamison v. Collins, 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000); People v. Ghent, 739 P.2d 1250 (Cal. 1987); State v. Kleypas, 40 P.3d 139 (Kan. 2001), cert. denied, __ U.S. __, __ S. Ct. __, __ L. Ed. 2d __ (2002); Domingues v. State, 961 P.2d 1279 (Nev. 1998); State v. Nelson, 715 A.2d 281 (N.J. 1998); State v. Phillips, 656 N.E.2d 643, 671 (Ohio 1995); Hinojosa v. State, 4 S.W.3d 240, 252 (Tex. Crim. App. 1999).

In his reply brief, the defendant presents the additional argument that the United States Senate cannot approve a treaty "with reservations." As he states, "[i]t has been assumed, without analysis under the separation of powers doctrine, that the Senate has the right to place conditions and reservations on the provisions of a treaty to which it gives its 'consent' under the Treaty Clause." He then cites three decisions of the United States Supreme Court which, by his interpretation, compel this result. We have carefully reviewed these authorities, Clinton v. City of New York, 524 U.S. 417, 438, 118 S. Ct. 2091, 2103, 141 L. Ed. 2d 393, 414 (1998) (line item veto held invalid because the Constitution does not authorize the President "to enact, to amend, or to repeal statutes"); Bowsher v. Synar, 478 U.S. 714, 736, 106 S. Ct. 3181, 3193, 92 L. Ed. 2d 583, 603 (1986) ("[T]he powers vested in the Comptroller General under § 251 [of the balanced budget and Deficit Control Act of 1985] violate the command of the Constitution that the Congress play no direct role in the execution of the laws."); and INS v. Chadha, 462 U.S. 919, 954-55, 103 S. Ct. 2764, 2785-86, 77 L. Ed. 2d 317, 346-47 (1983) (congressional veto provision in section 244(c)(2) of the Immigration and Nationality Act, allowing one house of Congress to invalidate a decision of the Executive Branch, determined to be unconstitutional). While these three decisions all deal with separation of power issues, we respectfully disagree with the defendant's assertions that their rationales compel the conclusion that the United States Senate cannot approve a treaty "with reservations." In fact, a determination that the Senate can do so is implicit in the numerous other decisions considering defendants' treaty-based attacks on the imposition of capital punishment. See Coleman v. Mitchell, 268 F.3d 417, 443 n.12 (6th Cir. 2001), cert. denied, __ U.S. __, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002) ("'[T]he United States is not party to any treaty that prohibits capital punishment per se.'")

(quoting United States v. Bin Laden, 126 F. Supp. 2d 290, 294 (S.D.N.Y. 2001)). Thus, we respectfully disagree that the authorities cited by the defendant support his claim that the Treaty Clause of the United States Constitution prevents the Senate from approving a treaty with reservations.

Accordingly, we conclude that this assignment is without merit.

VII. Constitutionality of Tennessee Death Penalty Statutes

The defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, Article II, Section 2, and Article XI, Section 8, of the Tennessee Constitution are the following:

> **A. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants; specifically, the statutory aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted, whether viewed singly or collectively, that they fail to provide such a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death.[4]**

As to this claim, the defendant asserts in his brief that our supreme court ruled incorrectly in State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984), and State v. Blouvett, 904 S.W.2d 111 (Tenn. 1995), arguing that application of these holdings results in an overbroad construction of Tennessee Code Annotated section 39-13-204(i)(2) and violates his right to substantive due process. Thus, he invites this court to reconsider these decisions. However, this court, being inferior to our supreme court, is bound by its decisions and must abide with its "order, decrees and precedents." State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995). Applying the holdings of our supreme court in Caldwell and Blouvett, we conclude that this assignment is without merit.

> **B. The death sentence is imposed capriciously and arbitrarily in that:**

[4] We note that factors (i)(5), (i)(6), and (i)(7) do not pertain to this case as they were not relied upon by the State. Thus, any individual claim with respect to these factors is without merit. See, e.g., State v. Hall, 958 S.W.2d 679, 715 (Tenn. 1997); State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994).

(1) unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty, and

(2) it is imposed in a discriminatory manner based upon economics, race, geography, and gender.

These arguments have been rejected on numerous occasions by our supreme court. See State v. McKinney, 74 S.W.3d 291, 319 (Tenn.), cert. denied, __ U.S. __, __ S. Ct. __, __ L. Ed. 2d __ (2002).

(3) there are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter.

This argument has been rejected by our supreme court. See State v. Caughron, 855 S.W.2d 526, 542 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426 (1993).

(4) the death qualification process skews the make-up of the jury and results in a relatively prosecution-prone guilt-prone jury.

This argument, likewise, has been rejected. See State v. Teel, 793 S.W.2d 236, 246 (Tenn.), cert. denied, 498 U.S. 1007, 111 S. Ct. 571, 112 L. Ed. 2d 577 (1990); State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), cert. denied, 476 U.S. 1153, 106 S. Ct. 2261, 90 L. Ed. 2d 705 (1986).

(5) defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, i.e., the cost of incarceration versus cost of execution, deterrence, method of execution, and parole eligibility.

This argument has been rejected by our supreme court. See Terry v. State, 46 S.W.3d 147, 170 (Tenn.), cert. denied, __ U.S. __, 122 S. Ct. 553, 151 L. Ed. 2d 428 (2001); Brimmer, 876 S.W.2d at 86-87; State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991).

(6) the jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a nonunanimous verdict.

This argument has been rejected by our supreme court. See Terry, 46 S.W.3d at 170; Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 22-23 (Tenn. 1993).

(7) requiring the jury to agree unanimously to a life verdict violates Mills v. Maryland[5] and McKoy v. North Carolina.[6]

This argument has been rejected by our supreme court. See Brimmer, 876 S.W.2d at 87; State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), superseded by statute as recognized by State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994).

(8) there is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances.

This argument has been rejected. See State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); Thompson, 768 S.W.2d at 251-52.

(9) the jury is not required to make the ultimate determination that death is the appropriate penalty.

This argument has been rejected by our supreme court. See Brimmer, 876 S.W.2d at 87; Smith, 857 S.W.2d at 22.

(10) the defendant is denied final closing argument in the penalty phase of the trial.

This argument has been rejected. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; Caughron, 855 S.W.2d at 542.

(11) permitting a capital defendant to waive introduction of mitigation evidence without permitting such evidence to be placed in the record for purposes of proportionality review renders the Tennessee death penalty statutes unconstitutional.

Since the defendant presented mitigating evidence during the penalty phase, this claim appears to be irrelevant to his appeal. The Supreme Court of the United States does not require a defendant to present mitigating evidence; rather, statements by the Court regarding the ability of a defendant to present such evidence are phrased permissively. See, e.g., Blystone v. Pennsylvania, 494 U.S. 299, 307 n.5, 110 S. Ct. 1078, 1083, n.5, 108 L. Ed. 2d 255 (1990); McCleskey v. Kemp, 481 U.S. 279, 305-06, 107 S. Ct. 1756, 1774-75, 95 L. Ed. 2d 262 (1987); Skipper v. South Carolina, 476 U.S. 1, 8, 106 S. Ct. 1669, 1672-73, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104,

[5] 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

[6] 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

113-14, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978). Further, the Eighth Amendment and evolving standards of decency neither require nor demand that an unwilling defendant present an affirmative penalty defense in a capital case. See State v. Smith, 993 S.W.2d 6, 13-14 (Tenn. 1999).

This assignment is irrelevant to the defendant's case but, even if it were relevant, it is without merit.

(12) mandatory introduction of victim impact evidence and of other crime evidence upon prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing.

Tennessee Code Annotated section 39-13-204(c) provides that a trial court "shall" permit a victim's representative to testify before the jury in sentencing, and the defendant asserts that "[t]his legislation improperly infringes upon a trial court's power to conduct proceedings and is thus a violation of separation of powers." Additionally, he argues that the legislative mandate and the supreme court's decision in State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), "render death sentencing in Tennessee unconstitutional since this factor is rife with discrimination and violates equal protection guarantees of the state and federal constitutions."

Initially, as to the defendant's criticism of our supreme court's holding in Nesbit, we respectfully decline to review this decision because, being an intermediate court, we are without authority to overturn it, as the defendant apparently invites us to do. However, we will review the defendant's complaint as to the language in Tennessee Code Annotated section 39-13-204(c), permitting testimony at the sentencing hearing "about the impact of the murder on the family of the victim and other relevant persons."

As our supreme court explained in State v. McKinney, 74 S.W.3d 291 (Tenn. 2002), neither the United States nor the Tennessee Constitution precludes the introduction of "victim impact" evidence:

> The introduction of "victim impact" evidence and prosecutorial argument is not precluded by either the United States Constitution or the Tennessee Constitution in a capital sentencing proceeding. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991); State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998). As the United States Supreme Court has explained:
>
> > We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific

> harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, *so too the victim is an individual whose death represents a unique loss to society and in particular to his family.*"

Id. at 308-09 (quoting Payne v. Tennessee, 501 U.S. at 825, 111 S. Ct. at 2608 (alteration in original) (emphasis added)).

Thus, it is clear that this statute does not make admissible that which, otherwise, would be proscribed.

We now will review the defendant's claim that this statute violates the separation of powers. Initially, we note that the defendant has provided no legal authorities in support of this proposition.

In State v. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001), our supreme court discussed the roles of the General Assembly and the court regarding rules of evidence and procedure to be employed in court proceedings, recognizing that circumstances arise where it is impossible to perfectly preserve the "'theoretical lines of demarcation between the executive, legislative and judicial branches of government.'" Id. (quoting Petition of Burson, 909 S.W.2d 768, 774 (Tenn. 1995)). Noting the interdependency of the three branches of government, the court acknowledged the "broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law." Id. (citing Daugherty v. State, 216 Tenn. 666, 393 S.W.2d 739, 743 (1965)). However, the legislature's enactment of rules for use in the courts of this state is confined to those areas that are appropriate to the exercise of that power. Id. Additionally, the court acknowledged the judiciary's acceptance of procedural or evidentiary rules promulgated by the General Assembly where the legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court. Id. (citing Newton v. Cox, 878 S.W.2d 105, 112 (Tenn. 1994)). In so holding, the court stated that "[t]his Court has long held the view that comity and cooperation among the branches of government are beneficial to all, and consistent with constitutional principles, such practices are desired and ought to be nurtured and maintained." Id.

As of the effective date of the amendment, our supreme court had not yet filed its decision in Nesbit, which was decided and released on September 28, 1998, and held that Tennessee's capital sentencing statute authorizes the admission of victim impact evidence as "one of those myriad factors encompassed within the statutory language *nature and circumstances of the crime.*" 978 S.W.2d at 890.

We interpret the legislature's action in amending Tennessee Code Annotated section 39-13-204(c) as supplementing the operation of the Rules of Evidence. The use of the word "shall" is generally mandatory, but in the present context is not inflexible. The statute does not indicate what

weight should be given to the evidence nor does it indicate what sentence should be imposed. Moreover, regarding victim impact, the statute provides that the jury "may" consider said evidence. Consequently, the contested language does not impermissibly infringe upon the powers of the court.

Our conclusion is advocated by the position of our supreme court which made clear that "the rules of evidence do not limit the admissibility of evidence in a capital sentencing proceeding." State v. Stout, 46 S.W.3d 689, 702 (Tenn.), cert. denied, __ U.S. __, 122 S. Ct. 471, 151 L. Ed. 2d 386 (2001) (citing Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999)). The court interpreted section 39-13-204(c) as permitting "'trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing.'" Id. at 703 (quoting State v. Sims, 45 S.W.3d 1, 14 (Tenn. 2001)). To further explain the supreme court's acceptance of the legislature's action in this area, we restate the following principles adopted by our supreme court in Sims:

> The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

45 S.W.3d at 14.

Accordingly, we conclude that the 1998 amendment to Tennessee Code Annotated section 39-13-204(c) does not violate the separation of powers clauses of either the Constitution of the State of Tennessee or the Constitution of the United States of America.

This assignment is without merit.

C. The appellate review process in death penalty cases is constitutionally inadequate.

This argument has been rejected by our supreme court. See Cazes, 875 S.W.2d at 270-71; Harris, 839 S.W.2d at 77.

VIII. Review Pursuant to Tennessee Code Annotated section 39-13-206(c)

For a reviewing court to affirm the imposition of a death sentence, the court must determine whether:

> (A) The sentence of death was imposed in any arbitrary fashion;
>
> (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
>
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
>
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn. Code Ann. § 39-13-206(c)(1) (1997).

The sentencing phase in this matter proceeded in accord with the procedure established in the applicable statutory provisions and Rules of Criminal Procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence indisputably supports aggravating circumstance (i)(2) (the defendant was previously convicted of one or more felonies which involved the use of violence to the person). See Tenn. Code Ann. § 39-13-204(i)(2).

Additionally, this court is required by Tennessee Code Annotated section 39-13-206(c)(1)(D), and under the mandates of State v. Bland, 958 S.W.2d 651, 661-74 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536, 140 L. Ed. 2d 686 (1998), to determine whether the defendant's sentence of death is disproportionate to the penalty imposed in similar cases. See State v. Godsey, 60 S.W.3d 759, 781 (Tenn. 2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "'disproportionate to the punishment imposed on others convicted of the same crime.'" Stout, 46 S.W.3d at 706 (quoting Bland, 958 S.W.2d at 662). "If a case is 'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." Id. (quoting Bland, 958 S.W.2d at 668).

In conducting our proportionality review, this court must compare the present case with cases involving similar defendants and similar crimes. See Stout, 46 S.W.3d at 706; see also Terry v. State, 46 S.W.3d 147, 163 (Tenn.), cert. denied, __U.S. __, 122 S. Ct. 553, 151 L. Ed. 2d 428 (2001). We consider only those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. See Godsey, 60 S.W.3d at 783; State v. Carruthers, 35 S.W.3d 516,

570 (Tenn. 2000), cert. denied, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757 (2001). We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See Terry, 46 S.W.3d at 163 (citing State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual defendant.'" Terry, 46 S.W.3d at 163 (quoting McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)).

Applying this approach, the court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. See Terry, 46 S.W.3d at 164. Regarding the circumstances of the crime itself, numerous factors are considered including: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of provocation; (7) the absence or presence of premeditation; (8) the absence or presence of justification; and (9) the injury to and effect on non-decedent victims. Stout, 46 S.W.3d at 706 (citing Bland, 958 S.W.2d at 667); see also Terry, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the defendant, including: (1) prior criminal record; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." See generally Terry, 46 S.W.3d at 164. There is no mathematical or scientific formula to be employed. Thus, our function is not to limit our comparison to those cases where a death sentence "'is perfectly symmetrical,'" but rather, our objective is only to "'identify and to invalidate the aberrant death sentence.'" Terry, 46 S.W.3d at 164 (quoting Bland, 958 S.W.2d at 665).

The circumstances surrounding the murder in light of the relevant and comparative factors are that the defendant, armed with a knife, watched as an elderly woman parked her car, alone, in a parking garage. Without provocation, he surprised the victim and overpowered her at knifepoint, forcing her into the backseat of her car. When she asked him what he was doing, calling him "son," he told her he was going to rape her, saying, "I'll give you your damn son." Before raping her, the defendant stabbed the victim in her heart, the right lung, and the liver. While she was bleeding to death, he grabbed her from behind and raped her so savagely that he tore her vagina and caused bleeding from her anal and vaginal openings. The defendant left two bloody handprints on the victim's hips. Throughout the entire ordeal, the elderly victim was alive and conscious. During the attack, the victim told the defendant that "she had never had sex with a man before." After stabbing and raping the victim, the defendant left her to bleed to death in the backseat while he rummaged through her billfold looking for anything of value. After searching through her belongings, he left her in the car to die, threw her car keys down a stairwell, and left the scene to hide his clothes and conceal his crime.

The defendant was previously convicted of robbery in 1992, and he was convicted for the 1978 murder of Becky Roberts in Pearl, Mississippi. Evidence was presented establishing that the defendant was neglected and then abandoned by his biological parents. He was later adopted. As a child, the defendant was physically, emotionally, and sexually abused. At age 13, the defendant was institutionalized where a psychologist found him to be incorrigible, brain damaged, and unfit for society. The defendant was released from the institution at age 16 and murdered Becky Roberts at age 17. Defense expert, Dr. Steven Paul Rossby, a molecular neurobiologist, testified that the defendant's low level of serotonin made it less likely that he would be able to control feelings of rage.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. See, e.g., State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000), cert. denied, 532 U.S. 925, 121 S. Ct. 1367, 149 L. Ed. 2d 295 (2001) (finding (i)(2) and (i)(7) aggravating circumstances and imposing death where defendant shot and robbed sixty-nine-year-old victim); State v. Smith, 993 S.W.2d 6 (Tenn. 1999) (twenty-three-year-old defendant admitted to drinking alcohol and taking drugs prior to robbery and murder of victim and cooperated with authorities, death sentence upheld based upon (i)(2) aggravator); State v. Burns, 979 S.W.2d 276 (Tenn. 1998), cert. denied, 527 U.S. 1039, 119 S. Ct. 2402, 144 L. Ed. 2d 801 (1999) (defendant shot and killed victim during course of attempted robbery; evidence presented of defendant's religious faith and activities, death sentence upheld based upon (i)(5) aggravator); State v. Cribbs, 967 S.W.2d 773 (Tenn.), cert. denied, 525 U.S. 932, 119 S. Ct. 343, 142 L. Ed. 2d 283 (1998) (twenty-three-year-old defendant murdered female victim during robbery of victim's residence, death sentence upheld based upon (i)(2) aggravator); State v. Bush, 942 S.W.2d 489 (Tenn.), cert. denied, 522 U.S. 953, 118 S. Ct. 376 (1997) (finding (i)(5) and (i)(6) aggravating circumstances and imposing death despite evidence that defendant had troubled childhood and mental disease or defect); State v. Howell, 868 S.W.2d 238 (Tenn. 1993), cert. denied, 510 U.S. 1215, 114 S. Ct. 1339 (1994) (twenty-seven-year-old defendant shot clerk in the head during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993) (nineteen-year-old defendant killed seventy-four-year-old woman during robbery of Chinese restaurant by shooting victim in head, death sentence upheld based upon (i)(5) and (i)(12) aggravators); State v. Harries, 657 S.W.2d 414 (Tenn. 1983) (thirty-one-year-old male defendant shot and killed clerk during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); State v. Coleman, 619 S.W.2d 112 (Tenn. 1981) (twenty-two-year-old defendant shot and killed sixty-nine-year-old victim during course of robbery, death sentence upheld based upon (i)(2) aggravator). Additionally, the sentence of death has consistently been found proportionate where only one aggravating factor is found. See, e.g., State v. Sledge, 15 S.W.3d 93 (Tenn.), cert. denied, 531 U.S. 889, 121 S. Ct. 211, 148 L. Ed. 2d 149 (2000) (prior violent felony); Hall, 8 S.W.3d at 593 (heinous, atrocious, cruel); State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999) (heinous, atrocious, cruel); State v. Matson, 666 S.W.2d 41 (Tenn. 1984) (felony murder); State v. Caldwell, 671 S.W.2d 459 (Tenn. 1984) (prior violent felony).

Our review of these cases demonstrates that the sentence of death imposed upon the defendant is proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reached the decision that the sentence of death was not imposed arbitrarily, that the evidence supports the finding of the (i)(2) aggravator, that the evidence supports the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

IX. Cumulative Error

The defendant asserts that this court should not consider in isolation any errors that we deem harmless. He further argues that the cumulative effect of such errors could and did result in the violation of his right to due process. However, because we do not find multiple errors to be combined for consideration, this issue lacks merit.

CONCLUSION

We have considered the entire record in this cause and find the sentence of death was not imposed in any arbitrary fashion, that the evidence fully supports the jury's findings as to the statutory aggravating circumstance and that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt. A comparative proportionality review, considering both "the nature of the crime and the defendant," demonstrates that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Accordingly, we affirm the sentence of death.

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ALAN E. GLENN, JUDGE